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ACCOUNT STATED.

ACCOUNT STATED: FOR WHAT OPENED. After the completion of a building the owner and the builder had an accounting and settlement, and the owner, without making any claim for damages caused by delay in the prosecution of the work, gave his note for the balance found to be due. *Held*, that in the absence of fraud in procuring the settlement, mistake in making it, or ignorance of his rights when it was made, the owner could not defend against the note on the ground that there had been such delay resulting in damage to him. *Pickel v. The St. Louis Chamber of Commerce Association*, 65.

ADMINISTRATION.

1. ADMINISTRATION: ORDER OF SALE OF REAL ESTATE: IMPEACHMENT OF. An order of sale of real estate is not such a final order as will conclude the heirs of the decedent from showing, upon the incoming of the report of sale, that there are no debts, or that there are personal assets sufficient to pay all debts, or any other fact tending to show that the order ought not to have been made. *Fenix v. Fenix*, 27.

2. ADMINISTRATOR'S SALE: ERROR IN DEED: EQUITY FOR TITLE. Where a purchaser of land at administrator's sale pays the purchase money, and the same is applied in discharge of the debts of the decedent, but the land is not correctly described in the administrator's deed, an assignee of the purchaser will be entitled to a decree in equity correcting the error and divesting the legal title to the land out of the heirs of the decedent and vesting it in him. *Grayson v. Weddle*, 39.

3. ADMINISTRATION: FINAL SETTLEMENT SET ASIDE FOR FRAUD. If an administrator fails to account for interest collected on loans of money of the estate, and conceals from the court and the heirs the fact that he has collected such interest, the latter will be entitled to have his final settlement set aside and an account taken. *Smiley v. Smiley*, 44.

4. ADMINISTRATOR: LEGAL EFFECT OF HIS NOTE IN LOUISIANA. By the law of the state of Louisiana an administrator cannot, by executing a promissory note in his name as administrator, bind the estate of

the decedent; but he will ordinarily bind himself. If, however, he can show by competent evidence that the note was executed and received merely as an acknowledgment that the estate owed the debt, he will be permitted to do so; but parol evidence is not competent. *Stirling v. Winter's Executor*, 141.

5. ———: FINAL SETTLEMENT, WHEN VACATED. The final settlement of an administrator has the force and effect of a judgment, and can be vacated only for fraud or mistake. *McLean v. Bergner*, 414.

6. FINAL SETTLEMENT: NOTICE OF IN ENGLISH-GERMAN PAPER. A notice of final settlement of an administrator is sufficient when published in the English language, and on the English side of a newspaper published and printed in both the English and German languages, one side of the paper being German and the other English. *Ib.*

7. ADMINISTRATOR: PROMISE MADE TO, AFTER DECEDENT'S DEATH. An administrator can sue in his representative capacity on a promise made to him after the death of the decedent, for the benefit of the estate. *Mosman v. Bender*, 579.

8. ———: CONTRACTS BY. Where an administrator, acting for the best interests of the estate, releases a levy of execution on land which is subject to a lien of a prior judgment in favor of a third person for more than its value, in consideration of a promise to him to pay one-half of the judgment due the estate, such contract is not unlawful, and may be enforced against the promisor. *Ib.*

9. ADMINISTRATION; LIMITATIONS. Under the Administration Law, (R. S. 1879, § 189,) if no cause of action has accrued or exists in favor of the claimant upon his contract or claim when the two years' limitation begins to run, it is not a demand against the estate, within the meaning of the statute, and the limitation does not begin to run before the cause of action has accrued. *Tenny v. Lasley*, 664.

10. ———: ALLOWANCE OF DEMANDS NOT DUE. Revised Statutes 1879, sections 205, 206 of the Administration Law, relating to demands not due, contemplate demands existing in favor of a person in being, in whose favor a judgment may be rendered upon the demands prior to the maturity of the same, and refer to demands with some fixed or certain date of maturity, so as to admit of the rebate of six per cent from the date of judgment till the date of maturity. *Ib.*

11. LAND TITLE, LEGAL, EQUITABLE: NOTICE: ADMINISTRATION. Where one acquires the legal title to land with notice of some equitable right of another therein, such equitable right so held by such other person is an interest in the land, which can be sold and transferred by his administrator. *Atkison v. Henry*, 670.

ADMISSIONS.

SEE ESTOPPEL.

ADVERSE POSSESSION.

1. ESTATES FOR LIFE AND IN REMAINDER: ADVERSE POSSESSION. The possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater or different estate, make it adverse, so as to enable himself or others claiming under him to invoke the statute of limitations. *Keith v. Keith*, 125.

2. ADVERSE POSSESSION: ACCEPTANCE OF DEED FOR LESS THAN THE FEE. Acceptance of a deed from the true owner granting a life estate to the acceptor, with remainder over, waives any rights the latter may have acquired by a former adverse possession, and precludes him and those claiming under him from asserting that his subsequent possession is adverse as against the remainderman. *Ib.*

3. STATUTE OF LIMITATIONS, WHEN IT CANNOT BE INVOKED. The bar of the statute of limitations cannot be invoked where the occupancy relied on to support it, is neither adverse, nor accompanied by any act showing a claim of exclusive ownership. *Burke v. Adams*, 504.

AGENCY.

SEE PRINCIPAL AND AGENT.

ALIMONY.

SEE DIVORCE.

AMENDMENT.

SEE MANDAMUS, 2.

APPEALS.

1. JUSTICE'S COURT: APPEAL: NONSUIT: BAR. The plaintiff on appeal from a justice's court, has the right to dismiss his appeal in the circuit court, and thereby vacate entirely the judgment of the justice, and such judgment of nonsuit in the circuit court, and judgment of the justice, constitute no bar to another action. *Lee v. Kaiser*, 431.

2. ——: ——: NOTICE: DISMISSAL. An appeal having been taken more than ten days before the next term of the circuit court, and notice thereof served within three days of the next succeeding term, *Held*, that necessity of notice relates to the time when it becomes triable against the appellee, that the appeal had been perfected and the court had jurisdiction, and the appeal could be dismissed at such succeeding term, and pending a motion to affirm the judgment of the justice. *Ib.*

3. APPEAL: SUPERSEDEAS. The circuit court of the city of St. Louis granted, of its own motion, a new trial to plaintiff in a cause pending therein, and in obedience to a peremptory writ of mandamus from the St. Louis court of appeals, procured and served at the instance of the defendant in the cause in the circuit court, the order granting the new trial was vacated on terms imposed by the judgment of the court of appeals, *Held*, that neither the appeal with supersedeas bond taken by the judge of the circuit court to the Supreme Court, from the judgment in the mandamus proceeding, nor the same taken by the relator therein, being the defendant in the cause in the circuit court, would operate to stay a trial of said cause in the circuit court. *The State ex rel. Brainerd v. Thayer*, 436.

4. ——: ——. An appeal can operate as a supersedeas only in the case in which it is taken *Ib.*

5. OPENING ROAD: APPEAL: CERTIORARI. When all the errors committed in the proceedings in the county court, in the matter of opening a road, could have been corrected on appeal to the circuit court, and the relator was not prevented from taking his appeal by any misfortune to him, or by any fraudulent or unfair practice of his adversaries, he will not be permitted to have said proceedings reviewed by a writ of *certiorari*. *The State ex rel. Baublits v. The County Court of Nodaway County*, 500.

6. APPEAL FROM JUSTICE'S COURT, WHEN TRIABLE. Where an appeal from a judgment of a justice of the peace was not taken on the day it was rendered, and no notice of appeal was given, and the appellee did not enter his appearance on or before the second day of the first term of the appellate court, it is error for such court to hear the case and render judgment at such first term. *Hawley v. The Missouri Pacific Railway Company*, 540.

7. APPEAL: FINAL JUDGMENT. An order dissolving an attachment, is not a final judgment from which an appeal will lie. *Jones v. Evans*, 565.

8. JUSTICES OF THE PEACE: APPEAL: CORPORATIONS: RESIDENCE. A corporation, although chartered in another state, which keeps in this State an office or agent for the transaction of its usual and customary business, has a legal residence here in the county of such office or agent, and must prosecute its appeals from the judgment of a justice of the peace within ten days after rendition thereof. *Harding v. The Chicago & Alton Railroad Company*, 659.

ASSAULT TO RAPE.

SEE CRIMINAL LAW.

ASSIGNMENT.

1. ASSIGNMENT: POSSESSION: FRAUD. Retention of possession of personal property by the assignor after assignment for benefit of creditors, is not *per se* fraudulent, and does not render the assignment void. *Goodwin v. Kerr*, 276.

2. ASSIGNOR AND ASSIGNEE: SUBSEQUENT AGREEMENT. An assignment for benefit of creditors, free from fraud in its inception, duly executed, acknowledged and recorded, is not invalidated by a subsequent agreement between the assignor and assignee to disregard it, or by subsequent fraudulent acts on their part with respect to the assigned property. *Ib.*

3. EVIDENCE. The conduct of the assignor and assignee subsequent to the assignment, is a matter for the consideration of the jury in determining whether the assignment was fraudulent in its inception. *Ib.*

BANKS.

1 BANKING CORPORATION: POWER TO BORROW MONEY: CASHIER'S AUTHORITY. Where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor.

In order to show a cashier's authority to borrow money for his bank, it is not necessary to prove a power specially conferred upon him by the board of directors or a distinct ratification by them of the act after its consummation; his acts done in the ordinary course of the business actually confided to him as such cashier, are *prima facie* evidence that they fall within the scope of his duty. *Donnell v. The Lewis County Savings Bank*, 165.

2. ——: CORPORATION. If a bank borrows money and gives its note therefor, the fact that its officers may have misapplied the money cannot defeat the holder's right to recover. *Ib.*

3. PAPER DEPOSITED IN BANK FOR COLLECTION AND CREDIT. If paper be deposited in or forwarded to a bank for collection, and in pursuance of the usual mode of dealing, the bank places the amount to the credit of the depositor, and the latter thereupon draws, or is entitled to draw, against the same as cash, this works a transfer of title so that the depositor cannot afterward claim the paper, and it is immaterial that if the paper is not paid the bank has the right to charge it back. *Ayres v. Bank*, 79 Mo. 421, followed and re-affirmed. *Flannery v. Coates*, 444.

SEE CORPORATIONS.

BILL OF EXCEPTIONS.

BILL OF EXCEPTIONS, MATTER OF. A bill of exceptions cannot, as a general rule, include matters which did not occur at the term of the court at which it was filed. *Jones v. Evans*, 565.

SEE PRACTICE IN SUPREME COURT.

CHATTEL MORTGAGES.

SEE MORTGAGES AND DEEDS OF TRUST.

CONDEMNATION PROCEEDINGS.

See Municipal Corporations.

CONSTITUTIONAL LAW.

1. Intermarriage between whites and negroes: constitutional law. The act making intermarriage between white persons and negroes a felony, (R. S., § 1540,) is no violation of the 14th amendment of the Constitution of the United States.

Neither is that clause of the act which provides that the jury trying a party accused of such a marriage, may determine the proportion of negro blood in either party to the marriage from the appearance of such person, a violation of that clause of section 53, article 4 of the constitution of Missouri, which provides that "the general assembly shall not pass any local or special law regulating the practice or jurisdiction of or changing the rules of evidence in any judicial proceeding." *The State v. Jackson*, 175.

2. ——: ——. "The privileges and immunities of citizens of the United States" protected by the 14th amendment, are such as are secured to them by the Constitution of the United States and laws enacted in pursuance thereof, and the right of unrestricted marriage is not among these. *Ib.*

3. Implied promises. The law never raises a promise where the evidence shows the parties intended none. *The Aull Savings Bank v. Aull*, 199.

4. Constitution: local assessments. The power to pave the streets of the city of St. Louis, and to charge the costs of such improvements against the adjoining property, conferred by section 26, article 3, and section 18, article 6 of its charter, and the mode of its exercise prescribed by ordinance No. 12,041 of said city, are not in conflict with the provisions of the constitution of the State. *Farrar v. The City of St. Louis*, 379.

5. Special tax bills: circuit court, jurisdiction. Under the constitution of 1865, article 6, section 13, and Wagner's Statutes, (p. 430, § 2,) the circuit court of Jackson county had no jurisdiction of a suit to enforce the lien of a special tax bill for a less sum than $50. *Williams v. Payne*, 409.

6. Criminal law: information: constitution. The general assembly has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person, in lieu of informations as understood at common law. Affirming *State v. Kelm*, 79 Mo. 515. *The State v. Briscoe*, 643.

7. Order of court, violation of: imprisonment: constitution. The court can imprison a person until he obeys its lawful order, which it is in his power to perform, but it cannot, in making the order of commitment for enforcing its order, impose a fine or imprisonment as a punishment for the contempt of the offending party in disobeying the same, nor can it adjudge the payment and imprisonment till paid of costs and expenses incurred in the contempt proceeding, in favor of the adversary party, as this would be in violation of article 2, section 16 of the constitution, prohibiting imprisonment for debt. *Ex parte Crenshaw*, 447

CONTEMPT.

1. CONTEMPT: PUNISHMENT THEREFOR. Petitioner was found guilty by the circuit court of Jackson county, of contempt in willfully violating its restraining order, by removing and refusing to return certain fixtures in controversy in a pending civil suit, and was adjudged to pay the adversary party therein $150, as costs and expenses incurred by the latter in the contempt proceeding; also to pay a fine of $500, and that he restore the property mentioned in the order and be committed to jail until he paid said sums of money and returned the property, *Held*, that so much of the judgment of the court as related to the payment of the fine and the $150, was illegal and void. *Ex parte Crenshaw*, 447.

2. ORDERS OF COURT, VIOLATION OF: IMPRISONMENT: CONSTITUTION. The court can imprison a person until he obeys its lawful order, which it is in his power to perform, but it cannot, in making the order of commitment for enforcing its order, impose a fine or imprisonment as a punishment for the contempt of the offending party in disobeying the same, nor can it adjudge the payment and imprisonment till paid of costs and expenses incurred in the contempt proceeding, in favor of the adversary party, as this would be in violation of article 2, section 16 of the constitution, prohibiting imprisonment for debt. *Ib.*

CONTRACTS.

1. IMPLIED PROMISES. The law never raises a promise where the evidence shows the parties intended none. *The Aull Savings Bank v. Aull*, 199.

2. VOLUNTARY ASSOCIATION: CONTRACT: PERSONAL LIABILITY OF MEMBERS. The members of a voluntary association of individuals, organized for educational purposes, which contracts for the services of a teacher, are personally liable for her wages, in the absence of any agreement or understanding of the parties to the contrary. *Heath v. Goslin*, 310.

3. CONTRACT, CONSTRUCTION. Defendant, bank, recovered judgment on its cashier's bond on which S., B. and plaintiff were sureties, and thereafter plaintiff paid part of judgment under an agreement with defendant that execution as to its residue should be staid as to him until the appeal taken by B. in the suit on the bond should be determined, and all lawful means be used to obtain the residue of the judgment from B., *Held*, in an action for breach of this contract, that on the affirmance of the judgment appealed from by B. the defendant was not bound to seek satisfaction for the residue of said judgment against the sureties on B.'s appeal bond before making the same out of plaintiff. *Moll v. The Market Street Bank*, 440.

4. CONTRACT: TAXES: ILLEGAL COLLECTION. The county collector of St. Louis county illegally collected interest on taxes, and delivered the same to the county under a contract with the latter to hold it in trust until his right to collect had been judicially determined, pending which a separation of the county and the city of St. Louis was had, and the county paid the fund to the city, to be held on the

same trust. *Held*, that the city was liable therefor to the tax-payers, and that this was the case, notwithstanding there was a clause in the contract between the collector and the county, to the effect that the contract gave no tax-payer the right to sue the county for his share of said fund. *Loring v. The City of St. Louis*, 461.

5. ADMINISTRATOR: PROMISE MADE TO, AFTER DECEDENT'S DEATH. An administrator can sue in his representative capacity on a promise made to him after the death of the decedent, for the benefit of the estate. *Mosman v. Bender*, 579.

6. ——: CONTRACTS BY. Where an administrator, acting for the best interests of the estate, releases a levy of execution on land which is subject to a lien of a prior judgment in favor of a third person for more than its value, in consideration of a promise to him to pay one-half of the judgment due the estate, such contract is not unlawful, and may be enforced against the promisor. *Ib.*

7. EXECUTION OF CONTRACT, WHEN QUESTION FOR JURY. Where the evidence is conflicting upon the question of the execution of a contract, it should be submitted to the jury for determination. *May v. Burk*, 675.

SEE SALES.

CONTRIBUTORY NEGLIGENCE.

SEE NEGLIGENCE.

CONVERSION.

CONVERSION: BAILEE: AGENT: NOTICE. A bailee or agent of another, who, after being apprised of the rights of the real owner, retains possession of property, or of the proceeds of its sale, and refuses to deliver the same to such owner, is guilty of conversion. And it matters not, in this regard, that it was difficult to distinguish the property converted by the bailee from other property, which he had in his possession, and with which that converted was intermingled. *Dusky v. Rudder*, 400.

SEE HUSBAND AND WIFE, 6.

CORPORATIONS.

1. BANKING CORPORATION: POWER TO BORROW MONEY: CASHIER'S AUTHORITY. Where general banking powers are conferred by the charter of a banking corporation, the corporation may borrow money without having more specific authority therefor.

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facie evidence that they fall within the scope of his duty. *Donnell v. The Lewis County Savings Bank*, 165.

2. JUSTICES OF THE PEACE: APPEAL: CORPORATIONS: RESIDENCE. A corporation, although chartered in another state, which keeps in this State an office or agent for the transaction of its usual and customary business, has a legal residence here in the county of such office or agent, and must prosecute its appeals from the judgment of a justice of the peace within ten days after rendition thereof. *Harding v. The Chicago & Alton Railroad Company*, 659.

COVENANTS AGAINST INCUMBRANCES.

SEE VENDOR AND VENDEE, 3.

CRIMINAL COSTS.

CRIMINAL COSTS: STATUTE. The State is not liable for the expense of boarding and lodging a jury incurred before the going into effect of the act of March 8th, 1883, (Laws, p. 80,) where, in the trial of a felony, it was not permitted to separate, and failed to agree on a verdict; and this is the case although the account for said expense was allowed and certified to the State Auditor by the trial judge and prosecuting attorney, after the going into effect of said act. *The State ex rel. Allen v. Walker*, 610.

CRIMINAL LAW.

1. DRUGGIST: DRINKING LIQUOR ON THE PREMISES. The fact that liquor sold by a druggist is drunk by the purchaser on the premises, does not render the druggist liable to the penalties of this act, unless it is shown that the drinking was done with his knowledge and consent. *State v. McAdoo*, 216.

2. INDICTMENT: LARCENY: CATTLE. An indictment under section 1307, Revised Statutes 1879, for the larceny of neat cattle, is sufficient if it charges the theft of "certain cattle, to-wit, one steer," and the value need not be laid. The term "cattle" designates domestic quadrupeds collectively, but the term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of neat cattle, and it would be sufficient to use the word "steer" without employing the term "cattle" or "neat cattle." *The State v. Lawn*, 241.

3. STATUTORY CONSTRUCTION: LICENSE: DRUGGIST: MEDICATED BITTERS. Medicated bitters called "Dr. Wilson's Rocky Mountain Herb Bitters," and containing alcohol, are, within the prohibition of section one, acts of General Assembly of 1879, (Acts, p. 166,) (R. S., § 5472,) against dealers in drugs and medicines selling or giving away intoxicating liquors or medicated bitters containing alcohol, without having a dramshop keeper's license. *The State v. Wilson*, 303.

4. ——: ——. Nor can such dealer claim exemption in favor of his bitters under sec 3 of said act, (R. S., § 5474). The exemption

mentioned in that section refers to the use of liquors by a druggist in the admixture of necessary remedial compounds, as they are required in the ordinary business of a druggist, and not to an admixture which results in a compound popularly known as "bitters," and as such called for and used as an alcoholic beverage. *Ib.*

5. CRIMINAL LAW: EMBEZZLEMENT: AGENT: COMMISSIONS. One who auctions off "pools" upon a horse race, and receives the money of the purchaser, and gives a receipt therefor, is the agent of such purchaser, and if he converts such money to his own use with intent to deprive the owner of its use and value, he is guilty of embezzlement, although the money was placed in his hands for an immoral purpose. But where such agent is to receive a per cent of the money bid and placed in his hands, such per cent should be deducted from the amount, and the offense will not be a felony if such deduction reduces it below $30. *The State v. Shadd*, 358.

6. ASSAULT WITH INTENT TO RAPE: INDICTMENT. An indictment for an assault with intent to commit a rape, need not set forth the manner or means of the assault charged. The general averment that the assault was made with the intent to ravish, is all that is requisite, and the details as to the mode and means of the act, are matters of evidence. *The State v. Smith*, 516.

7. ASSAULT: ATTEMPT: INTENT. An assault with intent may exist without an actual attempt. There need not be a direct attempt at violence, but indirect preparations toward it will, in certain circumstances, constitute an assault, and the intent to use force may be inferred from the circumstances. *Ib.*

8. FALSE PRETENSES: SUFFICIENCY OF EVIDENCE: VENUE. Defendant bought twenty-four mules of G., in Randolph county, for $140 each, giving G. in payment for them $80 in cash, and a draft on M. & J., of St. Louis, for the balance of $3,248, representing to G. that he had the money in the hands of M. & J. with which to pay the draft, when in fact he had in their hands but $69.60, less $32, the freight on the mules. Defendant ordered the car for the shipment of the mules, directed them to be shipped in G.'s name, and at his request they were so shipped, and after the payment of the $80 and giving the draft for the balance, defendant procured G. to sign a statement that he had bought the mules, and that they were his. Defendant went to St. Louis on the train with the mules, and on the day they arrived he sold them and ran off with the money. He exhibited to the purchaser and to the consignee the statement he had procured G. to sign, showing he had bought the mules, and that they were his. *Held*, that when defendant paid G. for the mules by giving him $80 in cash, and a draft for the balance, he became invested with the property in them, and also their possession, that he was guilty of obtaining property by means of false representations, and that the venue of the offense was properly laid in Randolph county. *The State v. Dennis*, 589.

9. CRIMINAL LAW: INFORMATION: CONSTITUTION. The general assembly has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person, in lieu of informations as understood at common law. Affirming *State v. Kelm*, 79 Mo. 515. *The State v. Briscoe*, 643.

10. STATUTE: MANSLAUGHTER: INTENTIONAL KILLING. Where the killing is intentional, there can be no manslaughter in the third degree under Revised Statutes, section 1244, nor in the fourth degree under Revised Statutes, section 1249. *The State v. Dunn*, 681.

11. MANSLAUGHTER IN FOURTH DEGREE: STATUTE. Where the evidence shows that the defendant was the aggressor, and provoked the difficulty which resulted in the homicide, and intentionally killed the deceased, there can be no manslaughter at common law, and consequently none in the fourth degree under Revised Statutes section 1250. *Ib.*

DAMAGES.

1. REPLEVIN, VALUE OF GOODS HOW ASSESSED: DAMAGES. In an action of replevin, where the defendant claims the goods replevied and demands a return thereof, and the jury find in his favor, they should assess the value of the goods at the time of such assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention. *Pope v. Jenkins*, 30 Mo. 528, followed; *Woodburn v. Cogdal*, 39 Mo. 228, and *Miller v. Whitson*, 40 Mo. 101, dis approved. *Chapman v. Kerr*, 158.

2. CATTLE COMMUNICATING DISEASE: DAMAGES. Before the owner of cattle running at large in this State, can be held liable for damages caused by disease communicated by them to other cattle, it must be shown that he knew his cattle were diseased; and this rule applies as well to Texas as to native stock. *Bradford v. Floyd*, 207.

3. CATTLE RUNNING AT LARGE: DAMAGES. At common law it was the duty of every man to keep his cattle within his own inclosure. Failing to do so, he was liable for their trespasses upon the lands of others; and for any injury resulting from disease communicated by them, without regard to the question whether he was personally at fault, he was as much bound as if he had voluntarily permitted them to go at large. But in this State, in the absence of special stock laws, the common range is regarded as common property for the purposes of herding. The owner is not liable in damages for trespasses committed upon his neighbor's premises, except by breaking his lawful inclosure. *Ib.*

4. JUDGMENT, RECOVERY OF DAMAGES PAID UNDER. Recovery cannot be had by plaintiff, against defendant, for damages paid by him to defendant, under a judgment against plaintiff and in favor of defendant, nor for attorney's fees and costs incurred by plaintiff in the suit, so long as such judgment stands unreversed. *Atkison v. Henry*, 670.

SEE NEGLIGENCE, 7, 8.

DEED.

1. DEED: CONSIDERATION CLAUSE: PAROL EVIDENCE. It is true that a reservation of an interest in real estate can only be made by deed; but if the parties agree that the grantor may continue to use the

premises and he does so, this may be shown by parol in bar of an action for use and occupation. *The Aull Savings Bank v. Aull*, 199.

2. ———: CONSIDERATION CLAUSE: PAROL EVIDENCE. Where the grantor in a deed continued, after its execution and delivery, to use a part of the premises conveyed; *Held*, that parol evidence was admissible to show that this was part of the bargain; its effect was not to contradict the deed, but to explain the consideration clause, which is allowable. *Ib.*

3. SHERIFF'S DEED: ADVERTISEMENT: CLERICAL MISTAKE: EVIDENCE. A clerical mistake in an advertisement of sale of real estate by the sheriff, is insufficient to contradict the recitals in the sheriff's deed, which are by statute made evidence of the facts stated. R. S. 1855, § 56, p. 748; R. S. 1879, § 2392. Irregularities in the advertisement will not invalidate the title of *bona fide* purchasers who had no notice of such irregularities and no part in their commission. *Mitchell v. Nodaway County*, 257.

4. INSANE PERSON, DEED OF. The deed of an insane person, after being placed under guardianship, will be absolutely void; and guardianship is conclusive respecting the disability of the ward, whether he be insane or not. And it is immaterial from what cause his insanity resulted, whether from old age, sickness, habitual drunkenness or other causes whatever. *Rannells v. Gerner*, 474.

5. ———: ASSENT OF GUARDIAN. The assent of the guardian of an insane person to the latter's deed, confers upon that instrument no element of validity. *Ib.*

6. INSANE PERSON, DISPOSITION OF REAL ESTATE OF. The provisions of the statute for the disposition of the real estate of insane persons, (Wag. Stat., pp. 714, 715, §§ 19 to 29, inclusive,) are exclusive of every other method. The proceedings are *in rem*, binding and affecting no person, except so far as they deprive the owner of his land. *Ib.*

7. ———: EVIDENCE OF LUCID INTERVAL: DEED OF. No evidence of a lucid interval is admissible to controvert the insanity of a person after being placed in ward, and *non est factum* may be pleaded to his deed made after being placed under guardianship and the special matter given in evidence. *Ib.*

8. ALIEN: DESCENT: STATUTE. Under Revised Statutes 1879, section 325, an alien may take real estate by descent from an alien. *Burke v. Adams*, 504.

9. DEED, RECORDING: WHEN A DELIVERY. A deed with a receipt of the purchase money expressed therein and executed, acknowledged and placed on record by the grantor, is evidence of the latter's intent to pass title to the grantee, and these acts constitute such evidence of a delivery of the deed as to impose the burden upon the grantor and his privies to show, by clear countervailing proof, that a delivery was not intended. *Ib.*

DEEDS OF TRUST.

See Mortgages and Deeds of Trust.

DEPOSITIONS.

1. Depositions, when entitled to be read. A deposition taken pursuant to a stipulation that it should be read on the trial of the cause, subject to all objections on the grounds of irrelevancy, illegality and incompetency, may be read in evidence, although the witness at the time of the trial is within the jurisdiction of the court. *Chapman v. Kerr*, 158.

2. Deposition of party: admissibility of. The deposition of a party to the cause as a written statement of facts, is admissible in evidence, although he be present to testify, or has testified. *The State ex rel. Goldsoll v. The Chatham National Bank*, 626.

See Evidence, 18.

DIVORCE.

Divorce: alimony. A woman can have permanent alimony in this State only as incident to a decree of divorce in her favor. *McIntire v. McIntire*, 470.

DOWER.

Married woman: dower. A married woman can relinquish her dower in the real estate of her husband, only by "their joint deed, acknowledged and certified" as provided by statute. R. S. 1879, §§ 669, 2197. And the wife of an insane person does not relinquish her dower in the land of her husband, sold by his guardian, by joining with her husband in signing the deed thereto. Such deed, so far as the husband's execution of it is concerned, has no legal existence or vitality, he not being the possessor of a sound mind and capable of contracting. *Rannells v. Gerner*, 474.

DRAMSHOP LICENSE.

Dramshop license, petition for signers: statute. Under Revised Statutes of 1879, sections 5438, 5442, as amended by the act of the general assembly of March 24th, 1883, (Acts, pp. 87, 88,) the petition for a dramshop license, where the dramshop is to be kept in a block or square of a city containing 2,500 inhabitants or more, signed by two-thirds of the assessed tax-paying citizens of said block or square, is sufficient in respect to such signers, and the law being otherwise complied with by the applicant for the license, it is obligatory on the county court to issue it. *The State ex rel. Fitzpatrick v. Meyers*, 601.

DRUGGIST.

See Criminal Law.

Pleading Criminal.

EJECTMENT.

1. Description of land: ejectment: petition: verdict: writ of possession. A petition in ejectment to recover a strip of land lying on the dividing line between plaintiff and defendant, described the strip as "the south half of the south half of the southwest quarter of the northwest quarter of section 24, township 50, range 21, in Saline county." The verdict was, "We, the jury, find for plaintiff and designate a line" (describing it) "as the true line between plaintiff and defendant," and the judgment followed the verdict. *Held*, that the description in the petition was sufficient; that the verdict might have stopped at a finding for the plaintiff, but was not vitiated by the explanatory matter referring to the dividing line; and that a writ of possession based on this verdict and judgment sufficiently informed the officer executing it what land it was his duty to place the plaintiff in possession of. *Lemmon v. Hartsook*, 13.

2. Jurisdition: ejectment: venue. Where an appeal in an ejectment suit is taken from one county, the land in controversy being situated in another, and the record fails to show how the circuit court of such former county acquired jurisdiction, the judgment will be reversed. The circuit court of the former county could only acquire jurisdiction by a change of venue ordered by the circuit court of the latter. *Snitjer v. Downing*, 586.

3. Ejectment: possession: mesne profits. Both at common law and under statutes regulating the action of ejectment and allowing a recovery therein for waste and injury and mesne profits, the plaintiff must first establish his right to the possession during the period for which he claims rents and profits, before he can recover them for such period. *Atkison v. Henry*, 670.

EMBEZZLEMENT.

Embezzlement by township trustee. Section 41 of article 3 chapter 42 of Wagner's Statutes, providing for the punishment of officers converting to their own use the public money, embraces township trustees. *The State v. Cleveland*, 108.

EQUITY.

1. Equity; void deed no cloud on title: change of venue. In an action against several defendants, originating in Hickory county, some of the defendants applied for a change of venue, and the court ordered a change, as to them, to Pettis county. The court in Pettis county afterward rendered judgment against one of the defendants who had not joined in the application for the change, and who

never appeared to the action and was served only by publication; and his land was sold to satisfy the judgment. In a suit brought by this party to set aside the sheriff's deed, these facts, among others, appearing in the petition; *Held*, that the petition was bad on demurrer; that the court in Pettis county obtained no jurisdiction of this party; that the judgment was, therefore, a nullity as against him, and the deed was void, and so there was nothing upon which a court of equity could act. *Holland v. Johnson*, 34.

2. ——— : CONVEYANCE, WHEN SET ASIDE : MISTAKE : FRAUD. Where the grantee in a deed represented she was seeking only a life estate in certain land, and presented to the grantor, her daughter, a deed to be executed therefor, and the latter made the deed under the belief that she was conveying a life estate, when in fact it conveyed an absolute estate in fee simple; *Held*, that whether the transaction was one of mutual mistake or of fraudulent misrepresention on the part of the grantee, equity will set aside the conveyance. *Summers v. Coleman*, 488.

SEE HUSBAND AND WIFE.

ESTOPPEL.

1. DIVISION LINES FIXED BY ACT OF PARTIES: ESTOPPEL. Where one of two adjoining proprietors, for the purpose of enabling the other to locate a division fence, pointed out a line as the true dividing line between them, and the latter, relying upon this information, built the fence and made other improvements up to this line; *Held*, that as against him a grantee of the former proprietor was estopped to deny that this was the true line.

But where the parties agreed upon a line, neither knowing the true line and each intending to fix upon it, and each acting on the best information he could get and not relying wholly on the other; *Held*, that there was no estoppel. *Lemmon v. Hartsook*, 13.

2. PERSONAL JUDGMENTS: WHO CONCLUDED. Personal judgments conclude only parties and their privies, and cannot be invoked by strangers nor pleaded by them. *Quigley v. Mexico Southern Bank*, 289.

3. ESTOPPEL. Estoppels *in pais* are not applicable to *femmes covert*, except where regarded as *femmes sole* in consequence of the possession of separate estates. *Rannells v. Gerner*, 474.

4. OFFICER: SALARY: PRESUMPTION: ESTOPPEL. An officer of a city government must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary, and where the city has paid him the salary it regarded as due him, and he has received it as such, he is estopped from claiming more. *Galbreath v. The City of Moberly*, 484.

5. ESTOPPEL IN PAIS: MINOR. An estoppel *in pais* cannot be asserted against a minor. *Burke v. Adams*, 504.

6. ——— : WHAT NECESSARY TO. Nor can an estoppel *in pais* be invoked where the party sought to be estopped was not apprized of his rights nor unless the act of the party relied on as an estoppel, was pone

with the intent that the other party should act upon it, and the latter was induced thereby to change his relation to the subject matter thereof to his injury. *Ib.*

7. ESTOPPEL: ADMISSIONS. An admission made by one party to another, is not sufficient to create an estoppel *in pais*, unless the party to whom it was made acted upon it. The party claiming the benefit of the admission must show that his action was influenced by it, before he can set it up, or rely upon it. *Monks v. Belden*, 639.

EVIDENCE.

1. EVIDENCE IN EJECTMENT: DECLARATIONS OF GRANTOR OF A PARTY. In ejectment for a strip of land lying on the dividing line between plaintiff and defendant, defendant had offered evidence of acts and declarations of plaintiff's grantor, since deceased, tending to fix the line as claimed by defendant. Plaintiff, in rebuttal, offered evidence of declarations to the contrary made by his grantor while in possession. *Held*, that this latter evidence was competent. *Lemmon v. Hartsook*, 13.

2. LARCENY: EVIDENCE OF PRISONER'S POSSESSION OF BURGLARS' TOOLS. On a trial for larceny from a dwelling-house, it appeared that defendant was arrested in the vicinity of the *locus delicti* immediately after the commission of the larceny, under suspicious circumstances tending to connect him with the crime. It also appeared that divers rooms, closets and drawers in the house were ransacked; but there was no evidence that burglars' tools had been used to effect the entry or to open inner doors or drawers. *Held*, that evidence that the defendant, when arrested, had such tools in his possession was nevertheless admissible. *The State v. Davis*, 53.

3. DYING DECLARATIONS. To be admissible in evidence, dying declarations must relate to the identification of the prisoner or the deceased, or to the act of killing or to the circumstances attending the act and forming part of the *res gestae*. Hence, where the declaration was: "I believed he (defendant) was going after his pistol when he went into the house. * * I had seen him at the house with a pistol before;" *Held*, that this ought to have been excluded. *The State v. Vansant*, 67.

4. DYING DECLARATIONS are in their nature secondary evidence, and are so regarded in the law. It is, therefore, error to instruct a jury to give them the same weight they would if the declarant had testified before them. *Ib.*

5. HOMICIDE: EVIDENCE. On a trial for murder the State gave evidence that the defendant attempted to cut the deceased (his wife) with a knife during the night preceding the day of the homicide, and further showed, against the objection of defendant, that on the morning of the homicide the deceased exhibited a cut in her dress to a witness, and that the cut had the appearance of having been made with a knife. *Held*, that there was no error in admitting this latter evidence. *The State v. Lewis*, 110.

6. WITNESS: EVIDENCE OF CONVICTION. When parol evidence is objected to, the record must be produced to prove the conviction of a witness. Another witness will not be allowed to testify that he saw the first in the penitentiary as a convict. This is true equally whether the testimony is offered to affect his competency or his credibility. *Ib.*

7. THE PROBATE OF A WILL is a judicial proceeding, and when made in another state a copy properly authenticated under the laws of the United States, is to be received in evidence in the courts of this State under section 1, article 4 of the Constitution of the United States. *Keith v. Keith*, 125.

8. SALE OR CONSIGNMENT: EVIDENCE. Plaintiffs made sundry shipments of goods to defendants, and with them in each case sent bills in the form of ordinary merchants' bills of sale. *Held*, that if nothing appeared to the contrary, the jury were warranted in finding that the goods were sold, and that they could not find that they were consigned unless there was contradictory evidence clearly preponderating. *Chapman v. Kerr*, 158.

9 ———. ———. In order to overcome the presumptive evidence of a sale of goods, furnished by a bill accompanying the delivery thereof in the form an ordinary sales bill, it is not necessary to prove that such goods were received and accepted as a consignment if, pursuant to agreement, consigned for sale. *Ib.*

10. ———. DEPOSITIONS, WHEN ENTITLED TO BE READ. A deposition taken pursuant to a stipulation that it should be read on the trial of the cause, subject to all objections on the grounds of irrelevancy, illegality and incompetency, may be read in evidence, although the witness at the time of the trial is within the jurisdiction of the court. *Ib.*

11. AGENT'S DECLARATIONS AND VERBAL ACTS. The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railroad company, while away from the baggage-room of the company and engaged in the transaction of his private business on his own premises, gave directions to a stranger with reference to the delivery of baggage; *Held*, that they were not binding on the company. *City of Chillicothe ex rel. v. Raynard*, 185.

12. TAX BOOKS. The books in the collector's office are not records within the rule in *Vance v. Corrigan*, 78 Mo. 94, so that if the name of the defendant in the tax suit appears on those books as owning the land, he is to be regarded as the record owner. *Watt v. Donnell*, 195.

13. DEED: CONSIDERATION CLAUSE: PAROL EVIDENCE. It is true that a reservation of an interest in real estate can only be made by deed; but if the parties agree that the grantor may continue to use the premises and he does so, this may be shown by parol in bar of an action for use and occupation. *The Aull Savings Bank v. Aull*, 199.

14. TRANSPORTATION CONTRACT: ACTION: NEGLIGENCE: EVIDENCE. In an action for a negligent breach of a contract to transport cattle, the petition alleged as acts of negligence on the part of the railroad company, defendant: (1) That it had had the cattle loaded into an unsafe car, so that they had to be taken out and loaded into another: (2) That the loading into this car had been negligently done. By the contract the plaintiff had expressly agreed to load and unload at his own risk. At the trial he gave evidence that the car into which the cattle were transferred was not provided with proper bedding. *Held*, that this evidence was incompetent, because: (1) If bedding the cattle was embraced in the term "loading," the plaintiff had assumed the risk of this; (2) If it was not, then the negligence shown did not fall within the allegations of the petition. *Atchison v. The Chicago, Rock Island & Pacific Railway Company*, 213

15. NEGLIGENCE: EVIDENCE. In an action grounded on negligence, and alleging specific acts of negligence, evidence of other acts is inadmissible. *Ib.*

16. RAILROAD: NEGLECT TO FENCE: EVIDENCE. Direct evidence that stock passed through a defective place in the fence, is not required to sustain an action against a railroad for double damages for injuries to the stock, occasioned by the escape of the latter on the roadway at a place where defendant neglected to maintain a lawful fence. *Gee v. The St. Louis, Iron Mountain & Southern Railway Company*, 283.

17. EVIDENCE: ATTACHMENT WRIT: DEFECTS IN. In a suit by attaching creditors to set aside a fraudulent mortgage, the writ of attachment sued out *pendente lite* in term time without order of court, and although not made returnable to any court, term or day, is admissible in evidence to show that plaintiffs were attaching creditors in the attachment suit; the latter suit having been commenced with personal service with which defendants were served. *Donnell v. Byern*, 332.

18. LOST DEPOSITION. CERTIFIED COPY FROM SUPREME COURT. On the re-trial of a cause which had been reversed and remanded by the Supreme Court, a certified copy of a deposition made from the transcript of the record in the latter court, was properly admitted in evidence, it being shown that the original was lost, and also that it had been correctly copied and forwarded to the Supreme Court in the transcript, to which it belonged. *Ib.*

19. EVIDENCE: REBUTTAL: ADMITTING EVIDENCE OUT OF ITS ORDER. Evidence proper to be offered in chief, should not be admitted under the semblance of evidence in rebuttal, and while trial courts have a discretion in admitting evidence out of its regular order, such discretion is not an arbitrary one, but is judicial in its character and only to be exercised in the furtherance of justice. *Christal v. Craig*, 367.

20. SLANDER: EVIDENCE. Proof of the repetition of the slander alleged, after the time of the utterance, may be given in aggravation of damages as showing the *quo animo*, but evidence which is neither within the allegations of the petition nor rebuttal in its character, is not admissible. *Ib.*

21. EVIDENCE. Where the replication simply denies the allegations in the answer of a final settlement, the evidence will be confined to the issues thus made. *Galbreath v. The City of Moberly*, 484.

22. HUSBAND AND WIFE: EVIDENCE. In a contest between a wife and the husband's creditors, the latter, who asserted that the property in dispute was his, and not her separate estate, offered evidence to show that the husband had assessed the property in his own name, and also that he had taken out in his own name a fire insurance policy thereon. There was no evidence tending to show that this was done with the knowledge or consent of the wife; *Held*, that the evidence was incompetent to prove that any part of her separate estate had been relinquished by her, but was competent for the purpose of repelling the establishment of a separate estate in her as to any gift or acquisition from which his marital rights had not been excluded. *The State ex rel. Goldsoll v. The Chatham National Bank*, 626.

23. DEPOSITION OF PARTY: ADMISSIBILITY OF. The deposition of a party to the cause as a written statement of facts, is admissible in evidence, although he be present to testify, or has testified. *Ib.*

SEE ASSIGNMENT, 3.

PERSONAL PROPERTY.

MUNICIPAL CORPORATIONS.

EXECUTIONS.

EXECUTION: REPLEVIN OF PROPERTY LEVIED ON: SECOND EXECUTION. An execution was levied on personal property of the defendant sufficient to satisfy it. Before sale the property was taken out of the hands of the officer by replevin at the suit of a person who claimed it by purchase from the defendant after the levy. Thereupon a second execution was issued and a levy and sale were made thereunder. In an action against the officer making them; *Held*, that such a purchaser could not maintain replevin, that the property therefore remained *in custodia legis* and operated *sub modo* as a satisfaction of the first execution, and that the issuing of the second and the levy and sale under it were therefore unlawful, and the officer was liable accordingly. *The State ex rel. Colvin v. Six*, 61.

FALSE PRETENSES.

1. AN INDICTMENT for obtaining money under false pretenses which set out such pretenses, negatived their truth and further alleged "all of which the defendant then and there well knew," *Held*, after verdict, not to be obnoxious to the objection that the *scienter* was not sufficiently averred. *The State v. Janson*, 97.

2. AN INDICTMENT for obtaining money under false pretenses which alleged that defendant had falsely stated that he was about to ship, and had shipped, certain goods, and that upon the faith of the com-

ing thereof he obtained the money in question, *Held*, not obnoxious to the objection that it set out the representation of a future event merely. *Ib.*

See Criminal Law, 8.

FALSE REPRESENTATIONS.

Fraudulent representations: mistake: scienter. To support a personal action for fraudulent representations, it is not sufficient to show that the party making them did not know them to be true, and that they were, in fact, false; there must be fraud as distinguished from mere mistake. But, if the party state material facts, as of his own knowledge, of which he knows nothing whatever, and not as matter of opinion, such willful statement in ignorance of the truth is the same as the statement of a known falsehood, and will constitute a *scienter*. *Walsh v. Morse*, 568.

FENCES.

See Railroads.

FIXTURES.

Fixtures: severance. The owner of land has the right to sever fixtures from the freehold, and they may be severed and lose their character as fixtures by accident. *The State ex rel. Davis v. Goodnow*, 271.

FRAUD.

1. Assignment: possession: fraud. Retention of possession of personal property by the assignor after assignment for benefit of creditors, is not *per se* fraudulent, and does not render the assignment void. *Goodwin v. Kerr*, 276.

2. Fraudulent Conveyance: creditors. In a suit to set aside a fraudulent conveyance, defendants cannot set up as a defense fraud upon creditors who are strangers to the record. *Steadman v. Hayes*, 319.

3. Mortgage: title. The mortgagee in a mortgage, executed to secure a *bona fide* indebtedness, is a purchaser in good faith, and acquires the legal title of the mortgageor. *Ib.*

4. Fraud: equity. In a proceeding to set aside a fraudulent conveyance, the controlling question is, whether there was fraud in the transaction which would warrant a court of equity in setting it aside. *Ib.*

5. CONVEYANCE: FRAUD: EXISTING CREDITORS. A conveyance cannot be claimed to be fraudulent as to existing creditors, except by such creditors. *Burke v. Adams*, 504.

6. FRAUD: CREDITORS. Although a debtor has been overreached and defrauded in a business transaction, this is not a matter of which his creditors can take advantage. *Colbern v. Robinson*, 541.

7. SECURITY: FRAUD. The mere fact that the security given to secure a note is more than is necessary, is, of itself, no indication of fraud. *Ib.*

SEE EQUITY.

FRAUDULENT CONVEYANCES.

SEE FRAUD.

GARNISHMENT.

1. GARNISHMENT: SERVICE ON RAILROAD COMPANIES. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. *Haley v. The Hannibal & St. Joseph Railroad Company*, 112.

2. ——: BANK, DEPOSIT. Money deposited in bank to the credit of the depositor as "Supt." is liable to garnishment as a debt due the execution defendant, it appearing that the depositor was the latter's superintendent and that the money belonged to it. *Gregg v. The Farmers & Merchants' Bank of Hannibal, Garnishee*, 251.

GUARDIAN.

1. GUARDIAN OF INSANE PERSON: ESTATE, AUTHORITY AS TO. A guardian of an insane person has no authority to subject the estate in his charge, to the risks and hazards of any trade or business undertaking. *Michael v. Locke*, 548.

2. ——: STATUTE: PROBATE COURT. Such power is not conferred on the guardian by statute, nor have the probate courts the equitable jurisdiction to give it. *Ib.*

HOMESTEAD.

HOMESTEAD: CONVEYANCE BY WIDOW: MINOR CHILDREN. Under section 5, Wagner's Statutes, page 698, notwithstanding the sale and conveyance of the homestead by the widow, the minor children, until they maintain their majority, are entitled to its exclusive possession as against her vendee. *Roberts v. Ware*, 363.

HOMICIDE.

1. HOMICIDE. A series of instructions on the law of homicide, including self-defense, approved. *The State v. Vansant*, 67.

2. HOMICIDE: EVIDENCE. On a trial for murder the State gave evidence that the defendant attempted to cut the deceased (his wife) with a knife during the night preceding the day of the homicide, and further showed, against the objection of defendant, that on the morning of the homicide the deceased exhibited a cut in her dress to a witness, and that the cut had the appearance of having been made with a knife. *Held*, that there was no error in admitting this latter evidence. *The State v. Lewis*, 110.

SEE CRIMINAL LAW.

HUSBAND AND WIFE.

1. MARRIED WOMAN'S PERSONAL PROPERTY. Irrespective of statute, courts of law as well as equity now recognize the doctrine that personalty may be the absolute property of the wife under certain conditions. *McCoy v. Hyatt*, 130.

2. ———: EVIDENCE. The separate title of the wife to personalty may be established by words, acts and conduct as well as by writing; and where the proof of her ownership is clear, the fact that her husband is indebted does not affect her right. *Ib.*

3. ———: WIFE'S POSSESSION AND CONTROL. Long and uninterrupted control over personal property by the wife with the husband's acquiescence is presumptive evidence of her ownership against the creditors of her husband, where such property has not been mingled with his nor used by him so as to create a credit based upon his apparent ownership. *Ib.*

4. ———: THE ACT OF 1875. The married woman's act of 1875, (now § 3296, R. S. 1879,) in nowise interfered with the right of married women to acquire, or the manner in which they might acquire a separate estate in personalty by gift or purchase, as it previously existed. The act was designed to enlarge the operation of the right, to simplify the proof of the existence of the estate, and to afford protection especially against the effects of the husband's reducing the property to possession, by providing that no such reduction should be effectual, unless evidenced by writing signed by her. *Ib.*

5. ———: PURCHASES BY MARRIED WOMAN. The purchases of a married woman protected by that act are those made with her separate money or means, and those only. *Ib.*

6. ———: GIFTS TO HER: MIXED PURCHASE AND GIFT: CONVERSION. The act protects gifts as well as purchases; and where a married woman, by her pleading claimed property by virtue both of gift and purchase, and there was evidence tending to show that she acquired it in consideration partly of love and affection and partly of money paid; *Held*, that it was error so to instruct the jury as to permit a

verdict for her only in case they found the money paid was her separate means. She might fail to show this, and consequently so far as the acquisition was a purchase it might be without the pale of the act, and yet so far as it was a gift, be protected; and the possible difficulty of ascertaining the exact extent of her interest would not warrant the court in withholding the question from the jury. *Held*, also, that where a married woman had such an undivided interest, if a person claiming through her husband appropriated the property to his exclusive use and denied her right altogether, that was in law a conversion, and entitled her to maintain an action against him, as in trover, for damages, to recover her interest. *Ib.*

7. HUSBAND AND WIFE'S JOINT ESTATE IN LAND, CONVEYANCE OF: TITLE BOND: EQUITY. Where husband and wife are seized in entirety, the husband may, without joining his wife, convey his legal or equitable estate, subject to her right of survivorship. But, where the husband alone executed a title bond for such land, *Held*, that the wife's estate could not be divested by reason thereof, although she afterward received from her husband part of the purchase money and thereupon expressed satisfaction with the sale. *Atkison v. Henry*, 151.

8. MARRIED WOMAN: MISTAKE IN HER DEED CANNOT BE REFORMED. As against a married woman a court of equity has no power to compel specific performance, to reform a deed, or to do anything else which will divest title to land out of her. Hence, where there were two deeds of trust executed by husband and wife, and both intended to cover the same land, but by mistake the earlier deed described a different tract, and because the holder of the later deed had notice of the mistake the court decreed that the first deed should be reformed and enforced as a first lien against the true land; *Held*, that this decree was correct so far as it related to the husband's interest, but erroneous so far as it related to the wife's, and as to her interest the second deed must remain the first lien. *Meier v. Blume*, 179.

9. ———: HER PERSONAL CHATTELS. Prior to the act of 1875, (R. S., § 3296,) personal chattels of the wife vested absolutely in the husband, and became subject to his debts. *Alexander v. Lydick*, 341.

10. ———: STATUTORY CONSTRUCTION: REVISED STATUTES, SECTION 3296. A sewing machine purchased by the wife in 1876, in part with the proceeds of a colt belonging to her husband, and in part with the products of her farm, held not to have been acquired "with her separate money or means," so as to give her an independent title thereto, within the provision of the acts of 1875. R. S., § 3296. *Ib.*

11. REVISED STATUTES, SECTION 3296: NECESSARIES FOR FAMILY. Medical services rendered the family are within the provisions of R. S., section 3295, subjecting her property to attachment and execution for debts and liabilities created by the husband for necessaries for the wife and family. *Ib.*

12. HUSBAND AND WIFE: GIFT BY HUSBAND: INSUFFICIENT EVIDENCE OF. On an examination of the evidence, *Held*, that it failed to show a complete and perfected gift to the wife, by the husband, of certain property, as claimed by her. *Ib.*

13. MARRIED WOMAN: GENERAL JUDGMENT AGAINST: HER CONTRACTS AND TORTS: LIABILITY FOR. A married woman is not liable on her contracts made during coverture, and no personal judgment can be rendered against her on account of them. She, however, is liable conjointly with her husband for torts committed during coverture, and a general judgment against her and her husband can be rendered therefor; but this liability relates only to such torts as she may have committed out of his presence, and without his order or consent; otherwise he is liable alone for them, and she is exempt, upon the presumption of being induced to commit them under his coercion. *Ib.*

14. ——: REPLEVIN BOND: GENERAL JUDGMENT: SURETIES. While a general judgment cannot be rendered against a married woman on a replevin bond, yet it can be rendered against her co-principal and sureties, who are legally liable thereon. *Ib.*

15. MARRIED WOMAN: DOWER. A married woman can relinquish her dower in the real estate of her husband, only by "their joint deed, acknowledged and certified" as provided by statute. R. S. 1879, §§ 669, 2197. And the wife of an insane person does not relinquish her dower in the land of her husband, sold by his guardian, by joining with her husband in signing the deed thereto. Such deed, so far as the husband's execution of it is concerned, has no legal existence or vitality, he not being the possessor of a sound mind and capable of contracting. *Rannells v. Gerner*, 474.

16. ——: ESTOPPEL. Estoppels *in pais* are not applicable to *femmes covert*, except where regarded as *femmes sole* in consequence of the possession of separate estates. *Ib.*

17. HUSBAND AND WIFE: SEPARATE ESTATE. Personal chattels brought to this State from a foreign country, and being when so brought the separate estate of the wife, continue to remain her separate estate here, irrespective of her husband's consent, until divested of that character by her acts. *The State ex rel. Goldsoll v. The Chatham National Bank*, 626.

18. ——. ——: EVIDENCE. In a contest between a wife and the husband's creditors, the latter, who asserted that the property in dispute was his, and not her separate estate, offered evidence to show that the husband had assessed the property in his own name, and also that he had taken out in his own name a fire insurance policy thereon. There was no evidence tending to show that this was done with the knowledge or consent of the wife; *Held*, that the evidence was incompetent to prove that any part of her separate estate had been relinquished by her, but was competent for the purpose of repelling the establishment of a separate estate in her as to any gift or acquisition from which his marital rights had not been excluded. *Ib.*

INDICTMENT.

SEE PLEADING CRIMINAL.

INFORMATION.

See Pleading Criminal.

INJUNCTION.

See Partnership, 2.

INSANE PERSONS.

1. The state lunatic asylum: pay patients: county patients. It is notessential to the validity of an order of the county court. making a pay patient in the State Lunatic Asylum a county patient, that there should be an express finding that the patient has not sufficient estate to support him; thiswill be presumed. An order that a patient already in the asylum "became a county patient at the lunatic asylum from this date," without more, will bind the county for his support there. *The State ex rel. Yarnell v. The Cole County Court*, 80.

2. ——; inquest of lunacy. The validity of such an order cannot be affected by proof of irregularities in the inquest of lunacy which took place before he was sent to the asylum. *Ib.*

3. ——: insane poor criminals. A citizen of Cole county, confined in the State Asylum as a county patient of that county, escaped and went to Moniteau county, and there committed a homicide, for which he was tried and acquitted on the ground of insanity, and in accordance with the statute was remanded bythe circuit court to the custody of the sheriff, to be held at the expense of *the proper county* until the county court should cause him to be removed to the asylum. *Held*, that under the statute, (R. S. 1879, §§ 4153, 4145, 4143,) this man remained the county patient of Cole county; that Cole county was the "proper county" to pay the expenses of his confinement, and that it was the duty of the county court of that county to cause him to be removed to the asylum. *Ib.*

4. Guardian of insane person: estate, authority as to. A guardian of an insane person has no authority to subject the estate in his charge, to the risks and hazards of any trade or business undertaking. *Michael v. Locke*, 548.

INSTRUCTIONS.

1. Homicide. A series of instructions on the law of homicide, including self-defense, approved. *The State v. Vansant*, 67.

2. Instructions. Where there is no evidence upon which to base an instruction, it is properly refused. *The State v. Gerber*, 94.

3. ——: repetition. The trial court commits no error in refusing to give an instruction which is substantially the same as one already given. *Harris v. Lee*, 420.

4. ———. Where there is a conviction for a higher offense, a defendant cannot complain of an instruction authorizing a conviction for a lower. And it is not error to refuse instructions when those given fairly present the case to the jury. *The State v. Smith*, 516.

5. CONDEMNATION PROCEEDINGS: EVIDENCE: INSTRUCTIONS. The city charter provided, in reference to proceedings to condemn property for street purposes, that "parties interested may submit proof to the jury, and the latter shall examine, personally, the property to be taken and assessed;" *Held*, that an instruction was erroneous which told the jury that in assessing the value of the property, they might wholly disregard the evidence offered, and make their finding from their own observation alone. *The City of Kansas v. Hill*, 523.

6. INSTRUCTIONS. An instruction which is wholly unintelligible, is properly refused. *Greer v. St. Louis, Iron Mountain & Southern Railway Company*, 555.

7. ———. It is not error to give an instruction when there is any evidence upon which to base it. *Walsh v. Morse*, 568.

8. PRACTICE: INSTRUCTIONS. Instructions based on a defense not raised by the answer, or on facts stated therein not constituting a defense are properly refused. *Mosman v. Bender*, 579.

9. PRACTICE CIVIL: INSTRUCTIONS. Instructions should be predicated on the whole evidence, and present, for the consideration of the jury, the different aspects of the questions at issue, as shown by the pleadings and evidence. *Mansur v. Botts*, 651.

10. PRACTICE CRIMINAL: HARMLESS INSTRUCTIONS. A defendant cannot complain of the giving of an instruction as to a grade of manslaughter, of which he was not convicted, even though the instruction was erroneous. *The State v. Dunn*, 681.

SEE PRACTICE IN SUPREME COURT, 6.

RAILROADS, 9.

JUDGMENTS.

1. PERSONAL JUDGMENTS: WHO CONCLUDED. Personal judgments conclude only parties and their privies, and cannot be invoked by strangers nor pleaded by them. *Quigley v. Mexico Southern Bank*, 289.

2. SEVERAL COUNTS: VERDICT ON ONE. Where the petition contains several counts, and all of them are submitted to the jury, who return a verdict for plaintiff on a specified one, this is an implied finding for defendant on the other counts, and the judgment will be a bar to any subsequent suit on the demands contained in the counts not named in the verdict. *Hoyle v. Farquharson*, 377.

3. JUDGMENT, RECOVERY OF DAMAGES PAID UNDER. Recovery cannot be had by plaintiff, against defendant, for damages paid by him to

defendant, under a judgment against plaintiff and in favor of defendant, nor for attorney's fees and costs incurred by plaintiff in the suit, so long as such judgment stands unreversed. *Atkison v. Henry*, 670.

JUDICIAL NOTICE.

1. TOWNSHIP ORGANIZATION: JUDICIAL NOTICE: INDICTMENT. Judicial notice is not taken of the fact that a county has adopted township organization. Unless such be the fact, there is no such office as that of township trustee. It is, therefore, essential that such fact be alleged in an indictment under section 41 of article 3, chapter 42 of Wagner's Statutes, against a township trustee for converting to his own use the public moneys of the township. See *City of Hopkins v. Railway Co.*, 79 Mo. 98. *The State v. Cleveland*, 108.

2. TEXAS CATTLE: JUDICIAL NOTICE. The courts will not take judicial notice of the supposed fact that during a particular season of the year what are known as Texas cattle have some contagious or infectious disease, communicable to native cattle by contact. If this be a fact, it must be made the subject of proof. *Bradford v. Floyd*, 207.

JURISDICTION.

1. JURISDICTION: EJECTMENT: VENUE. Where an appeal in an ejectment suit is taken from one county, the land in controversy being situated in another, and the record fails to show how the circuit court of such former county acquired jurisdiction, the judgment will be reversed. The circuit court of the former county could only acquire jurisdiction by a change of venue ordered by the circuit court of the latter. *Snitjer v. Downing*, 586.

2. JUSTICES OF THE PEACE: JURISDICTION, WANT OF. Justices of the peace have no jurisdiction of causes in which both plaintiff and defendant are non-residents of the county in which the action is brought. (R. S., § 2839,) nor do the suing out and service by defendant of subpœnas for witnesses, and the filing of a motion by him to rule the plaintiff to security for costs before moving to dismiss for want of jurisdiction, constitute such an appearance as to confer jurisdiction on the justice. *Smith v. Simpson*, 634.

3. ——: ——. *Semble*, that consent even could not give jurisdiction in such a case. *Ib.*

4. CRIMINAL LAW: INFORMATION: CONSTITUTION. The general assembly has no power under the constitution, to authorize criminal prosecutions by informations in the form of an affidavit of a private person, in lieu of informations as understood at common law. Affirming *State v. Kelm*, 79 Mo. 515. *The State v. Briscoe*, 643.

SEE RAILROADS, 4, 6, 10.

JURY.

1. CONDEMNATION OF PROPERTY FOR STREET PURPOSES: CHARTER: JURY. A jury of six men, freeholders of the City of Kansas, as provided for in the charter of said city, is a competent jury to try an appeal from the mayor to the circuit court, in a proceeding under the charter to condemn private property for the purposes of street extension. *The City of Kansas v. Hill*, 523.

2. JURORS, COMPETENCY; QUESTION OF FACT: REVIEW OF. The decision of a trial court in accepting or rejecting a juror, is the decision of a question of fact under the law; and it becomes the duty of such court to decide it like any other question of fact, and its decision ought not to be disturbed in the appellate court, if supported by evidence, because the seeming weight of evidence may be the other way. *The State ex rel. Goldsoll v. The Chatham National Bank*, 626.

JUSTICES' COURTS.

1. JUSTICES OF THE PEACE. A justice of the peace has no authority to do an official act beyond the limits of his own county. An application for a change of venue sworn to before a justice outside of his county is, therefore, not verified by affidavit. *Grayson v. Weddle*, 39.

2. JUSTICES' COURTS: CHANGE OF VENUE: JUDGMENT. A judgment entered by a justice of the peace after a change of venue has been applied for, in due form, is erroneous, but cannot be treated as a nullity in a collateral proceeding. *The State ex rel. Colvin v. Six*, 61.

3. RAILROADS: KILLING STOCK: JUSTICE'S JURISDICTION. In determining whether the justice of the peace, before whom a suit under the 43rd section of the Railroad Law has been brought, is of the township where the cattle were killed, this court is not confined to the plaintiff's statement of his cause of action, but may look as well to the justice's transcript. *Fields v. The Wabash, St. Louis & Pacific Railway Company*, 203.

4. ———: KILLING STOCK: JURISDICTION. On an appeal from a justice of the peace, in an action for the killing of stock, the transcript must show affirmatively that the justice had jurisdiction. Where the transcript does not show that the animal was killed in his township, or the statement itself does not appear in the record, the judgment cannot be sustained. *Matson v. The Hannibal & St. Joseph Railrord Company*, 229.

5. JUSTICE'S COURT: APPEAL: NONSUIT: BAR. The plaintiff on appeal from a justice's court, has the right to dismiss his appeal in the circuit court, and thereby vacate entirely the judgment of the justice, and such judgment of nonsuit in the circuit court, and judgment of the justice, constitute no bar to another action. *Lee v. Kaiser*, 431.

6. ———: ———: NOTICE: DISMISSAL. An appeal having been taken more than ten days before the next term of the circuit court, and notice thereof served within three days of the next succeeding term,

Held, that necessity of notice relates to the time when it becomes triable against the appellee, that the appeal had been perfected and the court had jurisdiction, and the appeal could be dismissed at such succeeding term, and pending a motion to affirm the judgment of the justice. *Ib.*

7. APPEAL FROM JUSTICE'S COURT, WHEN TRIABLE. Where an appeal from a judgment of a justice of the peace was not taken on the day it was rendered, and no notice of appeal was given, and the appellee did not enter his appearance on or before the second day of the first term of the appellate court, it is error for such court to hear the case and render judgment at such first term. *Hawley v. The Missouri Pacific Railway Company*, 540.

8. JUSTICES OF THE PEACE: JURISDICTION, WANT OF. Justices of the peace have no jurisdiction of causes in which both plaintiff and defendant are non-residents of the county in which the action is brought. (R. S., § 2839,) nor do the suing out and service by defendant of subpœnas for witnesses, and the filing of a motion by him to rule the plaintiff to security for costs before moving to dismiss for want of jurisdiction, constitute such an appearance as to confer jurisdiction on the justice. *Smith v. Simpson*, 634.

9. ——: ——. *Semble*, that consent even could not give jurisdiction in such a case. *Ib.*

LAND AND LAND TITLES.

1. LOST QUARTER SECTION CORNER. To establish a lost quarter section corner of an interior section, the rule is to ascertain the corners of the section on that side, and a point on the line connecting them and equi-distant from them will be the lost corner. *Lemmon v. Hartsook*, 13.

2. DIVISION LINES FIXED BY ACT OF PARTIES: ESTOPPEL. Where one of two adjoining proprietors, for the purpose of enabling the other to locate a division fence, pointed out a line as the true dividing line between them, and the latter, relying upon this information, built the fence and made other improvements up to this line; *Held*, that as against him a grantee of the former proprietor was estopped to deny that this was the true line.

But where the parties agreed upon a line, neither knowing the true line and each intending to fix upon it, and each acting on the best information he could get and not relying wholly on the other; *Held*, that there was no estoppel. *Ib.*

3. SWAMP LANDS. In the absence of evidence that the Secretary of the Interior has neglected or refused to decide whether a tract of land, in controversy in an action of ejectment, is swamp or overflowed land, or not, within the act of congress of September 28th, 1850, the defendant will not be permitted to show, by parol evidence, that it falls within that act, for the purpose of defeating a title held under the railroad land grant of congress of June 10th, 1852. *Palmer v. Boorn*, 99.

4. TAX DEED: ADVERSE POSSESSION. A tax deed made under the Back Tax Act of 1877 is of no validity as against one who has acquired title to the land by possession and is in the actual occupation thereof, unless he is made a defendant in the tax suit. *Watt v. Donnell*, 195.

5. ——: EJECTMENT. Such a deed passes only the title of the defendant in the tax suit, and unless supplemented by evidence that he had some title will not authorize a recovery in ejectment. *Ib.*

6. SWAMP LANDS: TITLE: RIGHT OF COUNTY TO PURCHASE AT MORTGAGE SALE. Under the act of February 23rd. 1855, (R. S. 1855, chap. 93,) and previous acts, the absolute title to the swamp lands in the different counties vested in them respectively, and when purchased of the county with mortgage to secure the purchase money, the county has the right to buy them in, the same as a purchase by a private mortgagee. *Mitchell v. Nodaway County*, 257.

7. LAND TITLE, LEGAL, EQUITABLE: NOTICE: ADMINISTRATION. Where one acquires the legal title to land with notice of some equitable right of another therein, such equitable right so held by such other person is an interest in the land, which can be sold and transferred by his administrator. *Atkison v. Henry*, 670.

LANDLORD AND TENANT.

LANDLORD AND TENANT: USE AND OCCUPATION. It is well settled law in this State that an action for use and occupation does not lie unless the relation of landlord and tenant, either express or implied, exists between the parties. *The Aull Savings Bank v. Aull*, 199.

SEE PARTNERSHIP, 1.

LARCENY.

LARCENY: EVIDENCE OF PRISONER'S POSSESSION OF BURGLARS' TOOLS. On a trial for larceny from a dwelling-house, it appeared that defendant was arrested in the vicinity of the *locus delicti* immediately after the commission of the larceny, under suspicious circumstances tending to connect him with the crime. It also appeared that divers rooms, closets and drawers in the house were ransacked; but there was no evidence that burglars' tools had been used to effect the entry or to open inner doors or drawers. *Held*, that evidence that the defendant, when arrested, had such tools in his possession was nevertheless admissible. *The State v. Davis*, 53.

SEE PLEADING CRIMINAL, 7.

LIBEL.

LIBEL: WORDS ACTIONABLE PER SE: PLEADING. Words written of one alleging that he was a supervising architect of a building, and that he promised to and did give the defendants work thereon for a com-

mission paid to him by them, are not actionable *per se*, and a petition in an action therefor, for libel, which fails to allege the extrinsic facts showing their libelous meaning, is fatally defective. *Legg v. Dunleavy*, 558.

LICENSE.

SEE DRAMSHOP LICENSE.

LIEN.

1. LIEN: PRIORITY. Where two liens upon real estate are created by the same decree, priority will be given to the one upon which execution is first issued and levied, and a purchaser at a sale thereunder will secure a better title than that acquired by a sheriff's deed at a subsequent sale under the other lien. *Shirley v. Brown*, 244.

2. MECHANIC'S LIEN. A mechanic's lien is enforceable for all the items of an account furnished by the original contractor, for supplying the articles needed in the construction of the building and machinery in which they were used, where it is inferable from the evidence they were furnished under one contract. *Fulton Iron Works v. North Center Creek Mining & Smelting Company*, 265.

SEE TAXES, 6, 7.

LIMITATIONS.

1. STATUTE OF LIMITATIONS: PLEADING. When the plaintiff relies on matter in avoidance of a plea of the statute of limitations, he must plead it specially. It will not be received in evidence under a general denial. *Moore v. Granby Mining Company*, 86.

2. ——: AVOIDANCE OF. To avoid the statute of limitations it is not sufficient to show that the plaintiff was ignorant of his rights until a time within the statutory period. It must appear that his ignorance was caused by some improper act or concealment practiced by the defendant. *Ib.*

3. ESTATES FOR LIFE AND IN REMAINDER: ADVERSE POSSESSION. The possession of a life tenant is not adverse to the estate of the remainderman, and he cannot, by his declarations, acts or claim of a greater or different estate, make it adverse, so as to enable himself or others claiming under him to invoke the statute of limitations. *Keith v. Keith*, 125.

4. LIMITATIONS: FOREIGN CAUSE OF ACTION. Whether a suit brought in this State on a cause of action originating in another state is barred by limitation, is to be determined by the law of this State. *Stirling v. Winter*, 141.

5. STATUTE OF LIMITATIONS, WHEN IT CANNOT BE INVOKED. The bar of the statute of limitations cannot be invoked where the occupancy relied on to support it, is neither adverse, nor accompanied by any act showing a claim of exclusive ownership. *Burke v. Adams*, 504.

6. ADMINISTRATION: LIMITATIONS. Under the Administration Law, (R. S. 1879, § 189,) if no cause of action has accrued or exists in favor of the claimant upon his contract or claim when the two years' limitation begins to run, it is not a demand against the estate, within the meaning of the statute, and the limitation does not begin to run before the cause of action has accrued. *Tenny v. Lasley*, 664.

LUNATICS.

SEE INSANE PERSONS.

DEEDS.

GUARDIAN.

MANDAMUS.

1. MANDAMUS: RES JUDICATA. When a legal liability has once been judicially ascertained, it will suffice, in a proceeding by mandamus to enforce it, to state that fact. The circumstances out of which it grows need not be stated. *School District No.* 11 *v. Lauderbaugh*, 190.

2. ——: AMENDMENT. In mandamus proceedings the court can grant no relief except what is specified in the alternative writ, and if not warranted in granting that must refuse any; but the writ is open to amendment. *Ib.*

MARRIED WOMAN.

SEE HUSBAND AND WIFE.

MISREPRESENTATION.

MISREPRESENTATION AS TO SOLVENCY: WHEN THIRD PERSON CANNOT MAINTAIN ACTION. A misrepresentation to one in regard to the solvency of him who makes it, gives no right of action in favor of a third person against the first for injury by reason of the second repeating such statement to the third person, no relation of principal and agent existing between the latter and the person repeating the statement, and the latter not having been authorized to communicate the statement to the third person. *Rawlings v. Bean*, 614.

MISTAKE.

MISTAKE: RECOVERY. Ordinarily an action cannot be maintained

upon the ground of plaintiff's mistake alone, unless the recovery which is sought would leave the defendant in *statu quo*, or unless defendant has been guilty of fraud, or misrepresentation, or would secure some unconscionable advantage by withholding the money. *Mathews v. The City of Kansas*, 231.

See Equity, 2.

False Representations.

Husband and Wife, 8.

Taxes, 4, 5.

MORTGAGES AND DEEDS OF TRUST.

1. Deeds of trust: satisfaction by stranger: subrogation. Where a land owner, to save his land, pays a note secured by a deed of trust executed by a former owner, and upon which he is not legally liable, the debt is not thereby extinguished; he is subrogated to the rights of the holder as against the maker. *Allen v. Dermott*, 56.

2. ———. The holder of a secured note may sue on the note without enforcing his security. *Ib.*

3. Deed of trust: sale: validity. A sale of real estate under a deed of trust executed before the late civil war is valid, although the grantors in the deed made to secure payment of promissory notes were citizens and residents of a state declared to be in insurrection at the time of the sale made while the war was in progress. *Mitchell v. Nodaway County*, 257.

4. Fraudulent Conveyance: creditors. In a suit to set aside a fraudulent conveyance, defendants cannot set up as a defense fraud upon creditors who are strangers to the record. *Steadman v. Hayes*, 319.

5. Mortgage: foreclosure: purchaser at irregular sale. A foreclosure sale, under a mortgage, which sale is irregular because made during a term of the county court instead of the circuit court, as required by law, does not operate to assign the mortgage debt itself to the purchaser at the sale, so that he can both hold the land and collect the residue due from the mortgageor on the debt. *Wells v. Lincoln County*, 424.

6. ———: creditor: preference. A debtor has the right to execute a mortgage to secure a note due one creditor, although such mortgage has the effect to hinder and delay his other creditors. *Colbern v. Robinson*, 541.

7. Security: fraud. The mere fact that the security given to secure a note is more than is necessary, is, of itself, no indication of fraud. *Ib.*

8. MORTGAGE: EFFECT OF. A mortgage given to secure the payment of a note, will not have the effect to withdraw the property included in it from the reach of creditors, and judgment creditors, whose judgments against such mortgaged property were rendered before the maturity of the note secured by the mortgage, and before the sale thereunder, may redeem the property from the mortgage, or protect themselves by bidding at the sale, or enjoin the sale until the validity of the mortgage debt can be ascertained. *Ib.*

9. CHATTEL MORTGAGE: FAILURE TO RECORD: SALE BY MORTGAGEOR IN POSSESSION. A mortgage of goods not recorded, and of which the mortgageor retained the possession, is a nullity as against a purchaser from such mortgageor in possession, even though the purchaser knew of the existence of the mortgage. *Rawlings v. Bean*, 614.

10. PERSONAL PROPERTY: MORTGAGEE: NOTICE OF PRIOR CLAIM. A mortgagee of personal property, who takes it with notice of an agreement that it should remain the property of the mortgageor's vendor until fully paid for, is bound by such agreement. *Kingsland v. Drum*, 646.

MUNICIPAL CORPORATIONS.

1. CONDEMNATION OF PROPERTY FOR STREET PURPOSES: CHARTER: JURY. A jury of six men, freeholders of the City of Kansas, as provided for in the charter of said city, is a competent jury to try an appeal from the mayor to the circuit court, in a proceeding under the charter to condemn private property for the purposes of street extension. *The City of Kansas v. Hill*, 523.

2. CONDEMNATION PROCEEDINGS: EVIDENCE. On the trial of said appeal, the defendant offered evidence to show that the fact that the real estate sought to be condemned was located, and had been located for many years, in the line of the street proposed to be extended, and between the east and west parts of said street already opened, diminished its value, which evidence the court excluded; *Held*, error. *Ib.*

3. ——: ——: INSTRUCTIONS. The city charter provided, in reference to proceedings to condemn property for street purposes, that "parties interested may submit proof to the jury, and the latter shall examine, personally, the property to be taken and assessed;" *Held*, that an instruction was erroneous which told the jury that in assessing the value of the property, they might wholly disregard the evidence offered, and make their finding from their own observation alone. *Ib.*

NEGLIGENCE.

1. PUBLIC PORTER: ACTION ON HIS BOND. A person whose baggage has been lost through the negligence of a public porter licensed by the city as such, may maintain an action on a bond given by him to the city pursuant to charter and ordinance for the faithful performance of the requirements of the ordinance and the safe delivery of all articles entrusted to his care. *City of Chillicothe ex rel. Matson v. Raynard*, 185.

2. RAILROADS: NEGLIGENCE. If a train does not stop, an attempt of a passenger to get off would, perhaps, constitute such contributory negligence as would preclude a recovery. But, if it stops for a moment, or moves so slowly as to be almost imperceptible, it will be for the jury to say whether it is such negligence as will preclude a recovery. *Clotworthy v. The Hannibal & St. Joseph Railroad Company*, 220.

3. ——: ——. Where a train stops long enough for a passenger to conveniently get off, and, without the fault of the company's servants, he fails to do so, and the conductor, not knowing and having no reason to suspect that he is in the act of alighting, causes the train to start while he is so alighting, the company will not be liable *Ib*

4. NEGLIGENCE: CHILD: STREET RAILWAY. Whether the driver of a street car, who sees a child under two years of age playing in the street within six feet of the track, and keeps a fast trot until he is within seven feet of the child, is guilty of negligence, is a question for the jury. *Farris v. Cass Avenue & Fair Ground Railway Company*, 325.

5. CHILD: CONTRIBUTORY NEGLIGENCE OF PARENT. Where a child under two years of age escaped, almost from under the eye of the mother, after she had taken all precautions reasonably possible for a person in her circumstances and state of life, onto a street railway and was killed by a passing car: *Held*, there could be no contributory negligence in the case. *Ib.*

6 CONTRIBUTORY NEGLIGENCE: ACTS OF CHILD. A child under two years of age is, by its own acts, incapable of contributory negligence. *Ib.*

7. RAILROADS: DUTY OF TRAVELER APPROACHING: CONTRIBUTORY NEGLIGENCE. One who approaches a railroad crossing at a locality familiar to him, where the track cannot be seen, and where the noise of an approaching train, if close, would drown the noise of his buggy, and who does not stop to listen for the train, nor look for it until upon the side-track eight and a half feet from the track, although warned in a manner to attract his attention, is guilty of such contributory negligence as will preclude a recovery for an injury sustained from the passing train while attempting to cross. *Hixson v. St. Louis, Hannibal & Keokuk Railroad Company*, 355.

8. NEGLIGENCE IN CONSTRUCTING DAM: DAMAGES: PLEADING. In an action for alleged special damages to plaintiff, occasioned by overflow of water on his land caused by defendant's negligence in constructing a dam, damages for injuries to the land itself, and as to which the petition contains no averment, connot be recovered. *Brown v The Chicago & Alton Railroad Company*, 457.

9. ——: ——: SICKNESS IN PLAINTIFF'S FAMILY: DAMAGES. Sickness in plaintiff's family, caused by such overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. *Ib.*

10. RAILROAD: ENGINE: ESCAPE OF FIRE. When, in an action for damages against a railroad for the negligent escape of fire from its engine, the defendant has offered proof of care on its part, which evidence is not contradicted, the court should not, as a matter of law, declare that plaintiff's *prima facie* case is reoutted. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 574.

11. ——: ——: ——. A railroad is not liable for the escape of fire from its engine when it has provided one with the latest, best and most approved machinery, appliances and contrivances to prevent its escape, and a careful and competent engineer to operate the engine, one who used reasonable care to prevent such escape of the fire. *Ib.*

SEE EVIDENCE, 14.

NOTICE.

PURCHASE WITH NOTICE: AGENCY. He who takes with notice of an equity, takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry, and a party will be as much bound by notice given to his agent as if it was given to himself personally; and the fact that the agent may be unable to read and write will be immaterial. *Meier v. Blume*, 179.

SEE PROMISSORY NOTES. 3, 4.

NUNC PRO TUNC ENTRIES.

SEE PRACTICE, CIVIL. 6

OFFICER.

OFFICER: SALARY: PRESUMPTION: ESTOPPEL. An officer of a city government must be presumed to have knowledge of the ordinances or orders establishing and continuing his salary, and where the city has paid him the salary it regarded as due him, and he has received it as such, he is estopped from claiming more. *Galbreath v. The City of Moberly*, 484.

PARTIES.

SEE PRACTICE, CIVIL.

PARTNERSHIP.

1. PARTNERSHIP: LANDLORD AND TENANT: FEEDING CATTLE ON SHARES. An agreement between landlord and tenant, as a part of the consideration for the lease of a farm, that the landlord shall furnish stock

enough to eat the hay, oats and corn raised on the demised premises, the tenant to feed the stock, and upon sale being made, the landlord to be re-paid his purchase money first, out of the proceeds, and the remainder to be equally divided between the parties, does not constitute them partners in respect to the stock bought and fed under the agreement, following and re-affirming same case, 68 Mo. 242. *Musser v. Brink*, 350.

2. INJUNCTION. The property in the cattle, under the agreement, remained in the landlord, and the contract having given the tenant no right to remove them from the farm or to dispose of them without the landlord's consent, injunction lies to prevent him from doing so. *Ib.*

PERSONAL PROPERTY.

1. PERSONAL PROPERTY: SALE: EVIDENCE OF TERMS. In a suit by plaintiffs to set aside a chattel mortgage to a third person, because they, as the vendors of the mortgageor, had, by the terms of the sale to him, reserved the property in themselves until it was fully paid for, it is competent for the plaintiffs to prove the terms of said contract of sale, either by the evidence of a person present when it was made, or by the admissions of the vendee in reference thereto, made by him while in possession of the property. *Kingsland v. Drum*, 646.

2. ——: MORTGAGEE: NOTICE OF PRIOR CLAIM. A mortgagee of personal property, who takes it with notice of an agreement that it should remain the property of the mortgageor's vendor until fully paid for, is bound by such agreement. *Ib.*

PLEADING CIVIL.

1. RAILROADS: KILLING LIVE STOCK: SUFFICIENCY OF COMPLAINT. In an action against a railroad company to recover for the killing of plaintiff's mare, the complaint alleged that the killing occurred where the railroad "was not fenced, and where there was no crossing on said railroad; * * that defendant had failed and neglected to maintain good and sufficient fences on the side of its road where said mare got on the track and was killed; and that by reason of the killing of said mare and by virtue of the 809th section of the Revised Statutes," judgment for double damages was prayed. *Held*, that these allegations and the reference to the statute sufficiently implied that it was defendant's duty to erect and maintain fences at the place, and that the mare got on the track in consequence of defendant's failure to do this, and that the complaint was good after verdict. *Jackson v. The St. Louis, Iron Mountain & Southern Railway Company*, 147.

2. PLEADING LEGAL CONCLUSIONS. An issue raised on the statement of a legal conclusion which presents the real point in controversy, will be regarded as sufficient after verdict. *Ib.*

3. RAILROADS: PLEADING. A complaint under the 43rd section of the Railroad Law omitted to aver that the cattle injured came upon

the track at a point where it was not fenced, but did state that the injury was occasioned "solely on account of the defendant's failure to maintain fences." *Held*, that this averment excluded every other implication than the one that the cattle came upon the track where it was not fenced, and sufficiently supplied the omission. *Fields v. The Wabash, St. Louis & Pacific Railway Company*, 203.

4. PETITION: ASSAULT AND BATTERY. A petition for assault and battery which does not charge that the assault was wrongful, but alleges that it was "with force and arms," is good after verdict. *McKee v. Calvert*, 348.

5. ———: ———: GENERAL VERDICT. One good count in a petition containing two counts for the same cause of action, will support a general verdict. *Ib.*

6. PLEADING: JOINDER OF DIFFERENT CAUSES OF ACTION: SLANDER. While under the code, in an action for slander, causes of action for words imputing to plaintiff the crimes of perjury, larceny and adultery may be united in the same petition, they should be separately stated, with the relief sought for each cause of action. *Christal v. Craig*, 367.

7. ———: MISJOINDER IN SAME COUNT: WAIVER. Where such causes of action are joined in the same count of the petition, and defendant does not move for a rule requiring plaintiff to elect, the objection of such misjoinder is waived. *Ib.*

8. SEVERAL CAUSES OF ACTION: GENERAL VERDICT. But if one or more of the causes of action thus united in the same count be fatally defective for failure of sufficient statement of facts to constitute a cause of action, a general verdict is erroneous as to all of the causes of action. *Ib.*

9. PLEADING: SLANDER. The statement of a cause of action for slander, for words imputing to a woman the crime of adultery, should contain an averment of her coverture, and in the absence of such averment, no instruction should be given as to said cause of action. *Ib.*

10. SLANDER: PLEADING: EXPLANATORY AVERMENTS. The words "You have took my pocket book and money, and have got it there in your bucket," are not actionable *per se*, and in an action for slander therefor the petition must contain explanatory averments showing their application and the imputation intended to be conveyed thereby. *Ib.*

11. PLEADING, CODE: AD DUMNUM CLAUSE. Under the code, a petition is not defective because it does not contain an *ad damnum* clause; it is sufficient in this respect if it contains a prayer for judgment for the damages demanded. *Ib.*

12. LIBEL: WORDS ACTIONABLE PER SE: PLEADING. Words written of one alleging that he was a supervising architect of a building, and that he promised to and did give the defendants work thereon for a commission paid to him by them, are not actionable *per se*, and a petition in an action therefor, for libel, which fails to allege the extrinsic facts showing their libelous meaning, is fatally defective. *Legg v. Dunleavy*, 558.

13. PLEADING: SPECIAL CONTRACT: COMMON COUNTS: CODE. Where a special contract has been fully executed, and nothing remains to be done but to pay the stipulated sum of money due thereon, the common counts in *indebitatus assumpsit* will lie to recover the same. This was the rule at common law, and it has not been changed by the code. *Mansur v. Botts*, 651.

14. PLEADING: SEVERAL DEFENSES. The several pleas of *non est factum* as to the instrument sued on, payment of another debt on a different note only appearing in suit by pleading and evidence tending to show why defendant is not liable on the note sued on, and the statute of limitations, do not constitute inconsistent defenses. *May v. Burk*, 675.

SEE RAILROADS.

EJECTMENT.

PLEADING CRIMINAL.

1. AN INDICTMENT for obtaining money under false pretenses which set out such pretenses, negatived their truth and further alleged "all of which the defendant then and there well knew," *Held*, after verdict, not to be obnoxious to the objection that the *scienter* was not sufficiently averred. *The State v. Janson*, 97.

2. AN INDICTMENT for obtaining money under false pretenses which alleged that defendant had falsely stated that he was about to ship, and had shipped, certain goods, and that upon the faith of the coming thereof he obtained the money in question, *Held*, not obnoxious to the objection that it set out the representation of a future event merely. *Ib.*

3. TOWNSHIP ORGANIZATION: JUDICIAL NOTICE: INDICTMENT. Judicial notice is not taken of the fact that a county has adopted township organization. Unless such be the fact, there is no such office as that of township trustee. It is, therefore, essential that such fact be alleged in an indictment under section 41 of article 3, chapter 42 of Wagner's Statutes, against a township trustee for converting to his own use the public moneys of the township. See *City of Hopkins v. Railway Co.*, 79 Mo. 98. *The State v. Cleveland*, 108.

4. INTOXICATING LIQUOR: INFORMATION: VARIANCE. Under Revised Statutes 1879, section 5459, permitting the maker of intoxicating liquor to sell the same, at the place where made, in quantities not less than one quart, but forbidding him to suffer the same to be drunk on the premises where sold, a conviction upon an information charging the sale of one pint without having a license as a dramshop keeper, is not sustained by proof of the sale of a quart, by the maker, at the place where made, and suffering the same to be drunk thereat. Suffering the liquor to be drunk at the place of sale is a distinct offense from the act of selling. *The State v. Apperger*, 173.

5. DRUGGIST SELLING LIQUOR: INDICTMENT NOT MULTIFARIOUS. An

indictment in one count charged the defendant, a druggist, with unlawfully selling intoxicating liquor in a quantity less than one gallon, to-wit: one gill of whisky for five cents, one gill of brandy for five cents, one gill of wine for five cents, one gill of gin for five cents, and also with allowing the liquor to be drunk on the premises. *Held*, not multifarious. *The State v. McAdoo*, 216.

6. ———. An indictment under the act of 1877, (Sess. Acts 1877, p. 342, § 1,) against a druggist for unlawfully selling intoxicating liquor, is bad unless it expressly avers that it was not sold for medicinal purposes. *Ib.*

7. INDICTMENT: LARCENY: CATTLE. An indictment under section 1307, Revised Statutes 1879, for the larceny of neat cattle, is sufficient if it charges the theft of "certain cattle, to-wit, one steer," and the value need not be laid. The term "cattle" designates domestic quadrupeds collectively, but the term "neat cattle" includes only cattle of the bovine species. A steer belongs to the class of neat cattle, and it would be sufficient to use the word "steer" without employing the term "cattle" or "neat cattle." *The State v. Lawn*, 241.

8. INDICTMENT, SUFFICIENCY OF. An indictment authorized by Revised Statutes 1879, section 1561, *Held*, sufficient, following *The State v. Fancher*, 71 Mo. 460. *The State v. Dennis*, 589.

9. ASSAULT WITH INTENT TO RAPE: INDICTMENT. An indictment for an assault with intent to commit a rape, need not set forth the manner or means of the assault charged. The general averment that the assault was made with the intent to ravish, is all that is requisite, and the details as to the mode and means of the act, are matters of evidence. *The State v. Smith*, 516.

PRACTICE CIVIL.

1. JURY TRIAL. Where an answer in ejectment combined a legal with an equitable defense, *Held*, that it was error to refuse a jury trial upon the issues at law. But where the parties after such refusal submitted the case for trial to a counselor of the court, stipulating that his finding should be entered as the finding of the court; *Held*, that this waived the right to have a jury. *Grayson v. Weddle*, 39.

2. INSTRUCTIONS. Where there is no evidence upon which to base an instruction, it is properly refused. *The State v. Gerber*, 94.

3. GARNISHMENT: SERVICE ON RAILROAD COMPANIES. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. *Haley v. The Hannibal & St. Joseph Railroad Company*, 112.

4. TRANSPORTATION CONTRACT: PARTY PLAINTIFF. Suit on a transportation contract is properly brought in the name of the consignor,

whether he be the owner of the property or not. *Atchison v. The Chicago, Rock Island v. Pacific Railway Company*, 213.

5. PRACTICE: DEMURRER. Where evidence is presented on both sides tending in any degree to establish the respective theories of plaintiff and defendant, it is error to take the case from the jury by instruction. *Clotworthy v. The Hannibal & St. Joseph Railroad Company*, 220.

6. PARTIES: ORDER OF PUBLICATION. One cannot be made a party to a suit under Revised Statutes, section 3499, when the petition and order of publication do not conform to the requirements of said section. *Quigley v. Mexico Southern Bank*, 289.

7. RECOVERY: PLEADING: INSTRUCTION. Recovery can only be had upon the case made by the pleadings. The issues cannot be changed by an instruction. *Glass v. Gelvin*, 297.

8. ENTRY NUNC PRO TUNC: WHEN MADE. Unless there is something of record by which to amend, an entry *nunc pro tunc* cannot be made. But where the files of the court, the motion, the entry of its filing, its purpose and the entry of similar orders at the same term, in the same cause, show that the order was made, a *nunc pro tunc* entry may be made. *Hansbrough v. Fudge*, 307; *Briant v. Jackson*, 318.

9. PRACTICE: REPLY: FAILURE TO FILE. Where a cause has been tried on the theory that a reply has been filed putting in issue the new matter of the answer, the omission to file such reply cannot be taken advantage of on an appeal. *Heath v. Goslin*, 310.

10. ——: VARIANCE. In an action for slander, it is not sufficient that the offense proved be equivalent to or substantially the one alleged; the phraseology must be the same. *Christal v. Craig*, 367.

11. ——: VARIANCE. An instruction in an action for slander, that if the words proved have the same sense as those alleged, there is no variance, is erroneous. *Ib.*

12. MISJOINDER: WAIVER. Misjoinder of causes of action must be taken advantage of by demurrer or answer, or it is waived. *Hoyle v. Farquharson*, 377.

13. SEVERAL COUNTS: VERDICT ON ONE. Where the petition contains several counts, and all of them are submitted to the jury, who return a verdict for plaintiff on a specified one, this is an implied finding for defendant on the other counts, and the judgment will be a bar to any subsequent suit on the demands contained in the counts not named in the verdict. *Ib.*

14. EVIDENCE. Where the replication simply denies the allegations in the answer of a final settlement, the evidence will be confined to the issues thus made. *Galbreath v. The City of Moberly*, 484.

15. PLEADING: PRACTICE: PARTIES. Where all of several tenants in common do not join in an action of *quare clausum fregit*, the defendant cannot take advantage of it after having gone to trial, but must

plead it in abatement. *Thompson v. The Chicago, Rock Island &. Pacific Railway Company*, 521.

16. ——: ——: ——. Under our practice, when a defect of parties appears on the face of the petition, it must be taken advantage of by demurrer, and if it does not so appear, by answer; and if not thus taken advantage of, the objection is deemed to be waived. *Ib.*

17. BILL OF EXCEPTIONS, MATTER OF. A bill of exceptions cannot, as a general rule, include matters which did not occur at the term of the court at which it was filed. *Jones v. Evans*, 565.

18. PRACTICE: DEMURRER. Where there is any testimony to support a cause of action, it should be left to the determination of the jury, and a demurrer to the evidence should not be sustained. *Walsh v. Morse*, 568.

19. INSTRUCTIONS. It is not error to give an instruction when there is any evidence upon which to base it. *Ib.*

20. PRACTICE: INSTRUCTIONS. Instructions based on a defense not raised by the answer, or on facts stated therein not constituting a defense are properly refused. *Mosman v. Bender*, 579.

21. EVIDENCE: SPECIAL CONTRACT: AMOUNT OF RECOVERY. But the plaintiff having introduced the special contract in evidence, is limited in his recovery to the sum specified therein, although in his petition he declared on a *quantum meruit*. *Mansur v. Botts*, 651.

22. PRACTICE CIVIL: INSTRUCTIONS. Instructions should be predicated on the whole evidence, and present, for the consideration of the jury, the different aspects of the questions at issue, as shown by the pleadings and evidence. *Ib.*

23. PRACTICE: PARTIES: FOREIGN ADMINISTRATORS. Foreign administrators cannot sue in the courts of this State; but if such defect of parties is not taken advantage of in the trial court by demurrer or answer, it will be deemed to be waived, and objection cannot be raised for the first time in the Supreme Court. *May v. Burk*, 675.

POSTPONEMENT AND CONTINUANCE OF TRIAL. See Kenney v. The Hannibal & St. Joseph Railroad Company, 573.

SEE INSTRUCTIONS.

PRACTICE CRIMINAL.

1. VENUE. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed. *The State v. Apperger*, 173.

2. DISCRETION OF COURT: WITNESS. Where a witness was not subpœnaed, and no diligence used to procure his attendance, it is within

the discretion of the trial court to refuse to allow him to testify after the case is closed, but before it is submitted to the jury. *The State v. Smith*, 516.

3. INDICTMENT: VARIANCE. Where the indictment charges the assault was made on *Olive Hodson*, and the evidence shows that it was *Mrs. Hodson*, *Held*, no variance material to the merits of the case, since the court below did not so find, and that finding is the test on this point. *Ib.*

4. ——: READING TO THE JURY. Revised Statutes, section 1908, does not require that the instructions should be read to the jury in the first instance, by the judge himself. *Ib.*

5. INSTRUCTIONS. Where there is a conviction for a higher offense, a defendant cannot complain of an instruction authorizing a conviction for a lower. And it is not error to refuse instructions when those given fairly present the case to the jury. *Ib.*

6. PRACTICE CRIMINAL: DISCHARGE OF JURY: JUDICIAL DISCRETION. Where a trial court has a discretion in a matter of practice, its exercise of the same is presumed to be sound and correct until the contrary is plainly and manifestly made to appear, and on the facts presented in the present case, it fails to appear that the trial court abused its discretion in discharging the juries on two trials of defendant for murder, because they could not agree on a verdict. *The State v. Dunn*, 681.

7. PRACTICE CRIMINAL: HARMLESS INSTRUCTIONS. A defendant cannot complain of the giving of an instruction as to a grade of manslaughter, of which he was not convicted, even though the instruction was erroneous. *Ib.*

8. PRISONER'S ABSENCE FROM MOTION FOR NEW TRIAL. Unless it appears from the record affirmatively that the prisoner was denied the right or privilege of being present when his motion for new trial was argued and determined, his absence will be no ground for reversal. *The State v. Lewis*, 110.

PRACTICE IN SUPREME COURT.

1. PRACTICE IN THE SUPREME COURT. Where the bill of exceptions preserves neither the motion for a new trial, nor that in arrest of judgment, the Supreme Court cannot take notice of the errors, if any, in the progress of the trial. *The State v. Janson*, 97.

2. PRISONER'S ABSENCE FROM MOTION FOR NEW TRIAL. Unless it appears from the record affirmatively, that the prisoner was denied the right or privilege of being present when his motion for new trial was argued and determined, his absence will be no ground for reversal. *The State v. Lewis*, 110.

3. REVIEWABLE ERRORS. Where no exception to the action of the court in overruling a motion for new trial is saved in the bill of exceptions, this court is limited to an examination of such errors as

may appear in the record proper. *Jackson v. The St. Louis, Iron Mountain & Southern Railway Company*, 147.

4. VENUE. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed. *The State v. Apperger*, 173.

5. PRACTICE: THE RECORD. This court will not reverse a judgment for refusal of the trial court to admit evidence, if it cannot determine from the record whether the evidence is material or not. *The Aull Savings Bank v. Aull*, 199.

6. ——: BILL OF EXCEPTIONS: INSTRUCTIONS. Where the petition sets forth a legal cause of action, and the evidence is not preserved in the bill of exceptions, but it is stated that the plaintiff introduced evidence tending to prove the allegations of the petition, and that defendant introduced no evidence, this court will presume that the evidence justified the trial court in refusing to take the case from the jury. And where, in such a case, an instruction appears in the record which authorizes the jury to find for the plaintiff without requiring them to find some fact legally essential to recovery, this will not be reversible error. When testimony is undisputed, an instruction may properly assume its truth. *Fields v. The Wabash, St. Louis & Pacific Railway Company*, 203.

7. INSTRUCTIONS: HARMLESS ERROR. This court will not reverse for an error in the phraseology of a single instruction, when it is manifest, taking it in connection with the issues made in the pleadings and all the other instructions, that the jury could not have been misled. *Bradford v. Floyd*, 207.

8. PRACTICE IN THE SUPREME COURT: BILL OF EXCEPTIONS. This court will not review a case, the record of which contains no bill of exceptions preserving the evidence and motions. *Ray v. Brown*, 230.

9. CRIMINAL PRACTICE: LARCENY: INSTRUCTIONS. On a trial for larceny where there is evidence to prove a mere trespass, and the defendant's guilt is very much in doubt, the Supreme Court will closely scrutinize the instructions and reverse the cause if they are misleading. *The State v. Irwin*, 249.

10. PRACTICE: OBJECTIONS: INSTRUCTIONS. This court will not review a case when no objections are made or exceptions saved to the admission of evidence during the trial, and no instructions asked, or given by the court. The law applicable to a case can only be reviewed by this court when declarations of law or instructions are asked. *Harrington v. Minor*, 270.

11. PRACTICE IN THE SUPREME COURT: BILL OF EXCEPTIONS. Where neither the motion for new trial nor that in arrest of judgment is preserved in the bill of exceptions, this court will only review such errors as are apparent in the record proper. *McKee v. Calvert*, 348.

12. SUPREME COURT: FORMER DECISION IN SAME CASE. The Supreme Court, on a second appeal in a cause, will follow its previous decis-

ion, unless the facts developed on the re-trial require a different decision as applicable thereto. *Musser v. Brink*, 350.

13. PRACTICE IN SUPREME COURT. The Supreme Court will reverse a cause for material error apparent on the face of the record, although no motion in arrest or for review is made in the circuit court. *McIntire v. McIntire*, 470.

14. INSTRUCTIONS, REVIEW OF. It is unnecessary to review instructions when the result of the trial could not lawfully be otherwise than it is. *Galbreath v. The City of Moberly*, 484.

15. APPEAL: AGREED CASE. The appeals in this proceeding *Held*, to be properly in the Supreme Court, under rule 20 thereof, relating to agreed cases. *The City of Kansas v. Hill*, 523.

16. EVIDENCE: SPECIAL CONTRACT: AMOUNT OF RECOVERY. But the plaintiff having introduced the special contract in evidence, is limited in his recovery to the sum specified therein, although in his petition he declared on a *quantum meruit*. *Mansur v. Botts*, 651.

SEE JURISDICTION, 2.

PRINCIPAL AND AGENT.

1. PRINCIPAL AND AGENT: LIABILITY ON CONTRACT OF AGENT: SEALED INSTRUMENT. Plaintiff sold one Y. a tract of land, the title to which was in doubt. By an instrument under seal, to which defendant was no party and in which he was not named, plaintiff agreed to use diligence in perfecting the title and to have it vested in Y., and thereupon Y. was to pay one-half of the purchase money, the other half being paid in cash. In making the purchase Y. was acting as agent of defendant, and he immediately assigned the contract to defendant, who took possession. Defendant had furnished the money for the cash payment. Plaintiff subsequently aided in perfecting the title, and the same was finally vested in defendant. *Held*, that though plaintiff could not maintain an action against defendant on the contract, because it was under seal and defendant was no party to it and was not named in it, yet he could sue on the implied obligation growing out of all the facts stated. *Moore v. Granby Mining & Smelting Company*, 86.

2. PURCHASE WITH NOTICE: AGENCY. He who takes with notice of an equity, takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry, and a party will be as much bound by notice given to his agent as if it was given to himself personally; and the fact that the agent may be unable to read and write will be immaterial. *Meier v. Blume*, 179.

3. AGENT'S DECLARATIONS AND VERBAL ACTS. The declarations of an agent are admissible as evidence against his principal only when made while transacting the business of the principal and as a part of the transaction which is the subject of inquiry. Hence, where the baggage-master of a railroad company, while away from the baggage-room of the company and engaged in the transaction of his

private business on his own premises, gave directions to a stranger with reference to the delivery of baggage; *Held*, that they weee not binding on the company. *City of Chillicothe ex rel. Matson v. Raynard*, 185.

4. ATTORNEY: NOTE HELD FOR COLLECTION ONLY: SALE WITHOUT AUTHORITY: LIABILITY OF PURCHASER. A bank is liable for the money collected on a note, where it was placed by the owner in the hands of an attorney for collection only, and the attorney, without the owner's authority, indorsed the latter's name thereon and sold it to the bank, which collected it from the maker; and this is true, although the bank was ignorant of the unauthorized indorsement and purchased the note in good faith for a full consideration and before maturity. *Quigley v. The Mexico Southern Bank*, 289.

PRINCIPAL AND SURETY.

1. JOINT DEBTORS: SURETYSHIP: SUBROGATION. Where one of three joint debtors gave security to another by way of indemnity against the debt; *Held*, that the third, who stood in the relation of surety to both, had no right to insist that the security should be exhausted before the creditor proceeded against him; (1) Because his only right in respect of the security was to be subrogated to its benefits, and this would not arise until he had paid the debt; (2) Because co-promisors cannot, by arrangements between themselves, hinder and delay their creditor in the collection of his demand. *Roberts v. Jeffries*, 115.

2. PRINCIPAL: SURETY: SUBROGATION. Where the purchaser of bank stock borrowed the money with which to pay for the same, giving his note therefor with personal security, the stock to be retained in the bank as further security to the payee of the note, and, after the death of the principal, the payee obtains judgment against the surety, such surety, as soon as he shall have paid the judgment, is entitled to be subrogated to the rights of the creditor in the principal's stock. *May v. Burk*, 675.

3. ——: ——. If the administrators of the deceased principal paid the judgment against his surety with the proceeds of the sale of the bank stock, upon the agreement of the surety to refund to them any excess of liabilities of decedent's estate over assets, then the surety was not a creditor of the estate, and the agreement was without consideration. *Ib.*

PRESUMPTIONS.

SEE OFFICER.

PRIORITY.

SEE LIEN.

PROMISSORY NOTES.

1. PAYMENT BY NOTE. The giving of a note for an existing indebtedness, is not a payment of the debt, unless it is given and accepted as such. *Wiles v. Robinson*, 47.

2. PROMISSORY NOTES. Where defendant's name appeared on a note in suit as indorser, but it was clearly shown that he was really the borrower of the money for which the note was given; *Held*, that an instruction which assumed that he was an accommodation indorser was error. *Donnell v. The Lewis County Savings Bank*, 165.

3. ———: NOTICE OF DISHONOR: ASSIGNMENT FOR CREDITORS: NON-RESIDENT CREDITOR. A bank of this State bound as indorser of a note payable in New York and held there, failed and made an assignment for the benefit of creditors. The note not being paid at maturity, the holder caused it to be protested and notice to be given to the bank, but not having heard of the failure and assignment, gave no notice to the assignee. *Held*, that the notice given was sufficient to bind the bank. *Ib.*

4. ———: ———. If one, whose name appears on a note as indorser, is really the maker, it is his duty to provide for its payment, and if he fails to do so, and the note goes to protest, he is not entitled to notice. *Ib.*

5. ———: CORPORATION. If a bank borrows money and gives its note therefor, the fact that its officers may have misapplied the money cannot defeat the holder's right to recover. *Ib.*

RAILROADS,

1. RAILROADS: FENCES. A railroad company is not liable for injuries to stock occasioned by defects in a fence which, when erected, was sufficient, unless it knew of such defects, or might have known if it had used due care in maintaining such fence. *Vinyard v. The St. Louis, Iron Mountain & Southern Railway Company*, 92.

2. GARNISHMENT: SERVICE ON RAILROAD COMPANIES. To make a valid garnishment of a railroad company under the proviso to section 2521, Revised Statutes 1879, the notice must be delivered to "the nearest station or freight agent" of the company, and the officer's return must so describe the person to whom it is delivered. A return describing him as the "nearest agent" is insufficient. *Haley v. The Hannibal & St. Joseph Railroad Company*, 112.

3. RAILROAD: CHANGE OF GAUGE AND ROUTE. The return to an alternative writ of mandamus requiring a railroad company to re-lay a certain portion of its road, which it had torn up and dismantled, and to re-equip, maintain and operate the same as a narrow-gauge railroad, showed in substance, that the respondent company had been formed by consolidation of several other companies; that it had acquired the portion of road in question (at the time a narrow-gauge) from one of these companies, and with it the rights, privileges and immunities secured by the charter of said company, among which was the power and right at any time to alter and change its road-bed,

or any part thereof; that because the bridges, iron and ties on the road acquired from said company had become worn out, dangerous and unfit for use, and for other considerations relating to the business of respondent and the convenience and safety of the public, respondent, in pursuance of authority derived from the public statutes of the State and a vote of more than two-thirds of its board of directors, had determined to change the whole of said road (of which the portion of road in question was but a part) to a standard gauge road; that respondent had actually made and completed this change on all of said road except the portion in question, and on that portion, for purposes of economy, convenience and safety, had caused a new route to be surveyed, and was proceeding with all reasonable dispatch to construct said changed line, and had provided the materials and equipments necessary for the operation of the same as a standard gauge road, and expected to complete the same within four months, which was as soon as it could be done with due and proper consideration of respondent's other business, economy, efficiency and the safety and convenience of the public; that respondent was in the meantime furnishing to the public all needed facilities in conveying persons and property between the termini of said dismantled line; that all of respondent's other lines were of the standard gauge, and that it was wholly impracticable successfully, efficiently and economically to maintain and operate the portion of road in question in connection with the rest as a narrow-gauge. *Held*, that this return was good on demurrer. *The State ex rel. v. The Missouri Pacific Railway Company*, 117.

4. ———: KILLING LIVE STOCK: SUFFICIENCY OF COMPLAINT. In an action against a railroad company to recover for the killing of plaintiff's mare, the complaint alleged that the killing occurred where the railroad "was not fenced, and where there was no crossing on said railroad; * * that defendant had failed and neglected to maintain good and sufficient fences on the side of its road where said mare got on the track and was killed; and that by reason of the killing of said mare and by virtue of the 809th section of the Revised Statutes," judgment for double damages was prayed. *Held*, that these allegations and the reference to the statute sufficiently implied that it was defendant's duty to erect and maintain fences at the place, and that the mare got on the track in consequence of defendant's failure to do this, and that the complaint was good after verdict. *Jackson v. The St. Louis, Iron Mountain & Southern Railway Company*, 147.

5. ———: KILLING STOCK: JUSTICE'S JURISDICTION. In determining whether the justice of the peace, before whom a suit under the 43rd section of the Railroad Law has been brought, is of the township where the cattle were killed, this court is not confined to the plaintiff's statement of his cause of action, but may look as well to the justice's transcript. *Fields v. The Wabash, St. Louis & Pacific Railway Company*, 203.

6. ———: ———: PLEADING. A complaint under the 43rd section of the Railroad Law omitted to aver that the cattle injured came upon the track at a point where it was not fenced, but did state that the injury was occasioned "solely on account of the defendant's failure to maintain fences." *Held*, that this averment excluded every other implication than the one that the cattle came upon the track where it was not fenced, and sufficiently supplied the omission. *Ib.*

7. ——: KILLING STOCK: JURISDICTION. On an appeal from a justice of the peace, in an action for the killing of stock, the transcript must show affirmatively that the justice had jurisdiction. Where the transcript does not show that the animal was killed in his township, or the statement itself does not appear in the record, the judgment cannot be sustained. *Matson v. The Hannibal & St. Joseph Railroad Company*, 229.

8. ——: NEGLECT TO FENCE: EVIDENCE. Direct evidence that stock passed through a defective place in the fence, is not required to sustain an action against a railroad for double damages for injuries to the stock, occasioned by the escape of the latter on the roadway at a place where defendant neglected to maintain a lawful fence. *Gee v. The St. Louis, Iron Mountain & Southern Railway Company*, 283.

9. ——: ——: SICKNESS IN PLAINTIFF'S FAMILY: DAMAGES. Sickness in plaintiff's family, caused by such overflow of water from defendant's negligently constructed dam, is a proper element of damages where the same is pleaded in the petition. *Brown v. The Chicago & Alton Railroad Company*, 457.

10. ——: ENGINE: ESCAPE OF FIRE. When, in an action for damages against a railroad for the negligent escape of fire from its engine, the defendant has offered proof of care on its part, which evidence is not contradicted, the court should not, as a matter of law, declare that plaintiff's *prima facie* case is rebutted. *Kenney v. The Hannibal & St. Joseph Railroad Company*, 574.

11. ——: ——: ——. A railroad is not liable for the escape of fire from its engine when it has provided one with the latest, best and most approved machinery, appliances and contrivances to prevent its escape, and a careful and competent engineer to operate the engine, one who used reasonable care to prevent such escape of the fire. *Ib.*

12. PLEADING: RAILROAD: KILLING STOCK. A statement, in an action against a railroad, for double damages for killing a colt, occasioned by its neglect to fence as required by law, which alleges that the killing occurred at a point where the road passes along, through and adjoining inclosed fields, negatives the idea that the colt might have been killed in an incorporated town. *Williams v. The Hannibal & St. Joseph Railroad Company*, 597.

13. RAILROAD; KILLING STOCK: INSTRUCTIONS. In such action, an instruction was unobjectionable which told the jury that they should find for defendant, if they believed that the fence, where the colt got over the same, was a post and plank one of the height of four and one-half feet, and that the same was broken down by plaintiff's colt or by some other horses, or by mules, and that thereby and at the time the fence was broken, the colt got on the track of the railroad and was killed. *Ib.*

14. JURISDICTION. The jurisdiction as to the amount in such action, would be governed by the sum claimed as single damages, and not by the amount after the damages are doubled. *Ib.*

15. RAILROAD: KILLING STOCK: DOUBLE DAMAGES: STATEMENT. A statement in an action before a justice of the peace, against a railroad for double damages for killing a horse, is sufficient which charges that the defendant, at a point on its road where the same passes along and adjoining inclosed and uninclosed lands, and not at a private or public crossing, ran over and killed the horse, and that defendant failed and neglected to erect or maintain good or sufficient fences on the sides of its road at the point where the horse got upon the track and was killed, and concludes with a prayer for double damages under the statute. *Johnson v. The Missouri Pacific Railway Company*, 620.

16. ———: STOCK: ESCAPE THROUGH ADJOINING PROPRIETOR'S PASTURE ONTO ROAD. Where, in such action against a railroad for killing plaintiff's horse, the evidence showed that plaintiff was not an adjoining proprietor within the meaning of the statute, and that his horse escaped from a pasture not coterminous with the right of way and through the inclosed field of an adjoining proprietor, it is necessary for the plaintiff to prove, before he can recover, that his horse was in the adjoining proprietor's field by authority, or that the fence of the field was not a lawful fence. *Ib.*

REPLEVIN.

1. EXCESSIVE TAX: REPLEVIN. Replevin will not lie against the collector of taxes to recover personal property seized to satisfy a tax levied by the proper officer; and it does not matter that the levy is excessive, and that fact is apparent on the face of the tax-book. *Mowrer v. Helferstine*, 23.

2. REPLEVIN, VALUE OF GOODS HOW ASSESSED: DAMAGES. In an action of replevin, where the defendant claims the goods replevied and demands a return thereof, and the jury find in his favor, they should assess the value of the goods at the time of such assessment, and the damages, if any, sustained by defendant in consequence of the taking and detention. *Pope v. Jenkins*, 30 Mo. 528, followed; *Woodburn v. Cogdal*, 39 Mo. 228, and *Miller v. Whitson*, 40 Mo. 101, disapproved. *Chapman v. Kerr*, 158.

ROADS.

SEE APPEALS, 5.

SALES.

1. SALE OR CONSIGNMENT: EVIDENCE. Plaintiffs made sundry shipments of goods to defendants, and with them in each case sent bills in the form of ordinary merchants' bills of sale. *Held*, that if nothing appeared to the contrary, the jury were warranted in finding that the goods were sold, and that they could not find that they were consigned unless there was contradictory evidence clearly preponderating. *Chapman v. Kerr*, 158.

2. ——: ——. In order to overcome the presumptive evidence of a sale of goods, furnished by a bill accompanying the delivery thereof in the form an ordinary sales bill, it is not necessary to prove that such goods were received and accepted as a consignment if, pursuant to agreement, consigned for sale. *Ib.*

3. DEED OF TRUST: SALE: VALIDITY. A sale of real estate under a deed of trust executed before the late civil war is valid, although the grantors in the deed made to secure payment of promissory notes were citizens and residents of a state declared to be in insurrection at the time of the sale made while the war was in progress. *Mitchell v. Nodaway County*, 257.

4. DELIVERY: QUESTION OF LAW OR FACT. When there is no dispute as to the facts, the question of delivery is one of law, but where there is a conflict in the evidence it is a question of fact for the jury. *Glass v. Gelvin*, 297.

5. POSSESSION: VENDOR: VENDEE: AGENT. A vendor may sell goods in the possession of his agent or bailee, and transfer a valid title, the possession of the agent then becoming the possession of the vendee. *Ib.*

6. MORTGAGE: FORECLOSURE: PURCHASER AT IRREGULAR SALE. A foreclosure sale, under a mortgage, which sale is irregular because made during a term of the county court instead of the circuit court, as required by law, does not operate to assign the mortgage debt itself to the purchaser at the sale, so that he can both hold the land and collect the residue due from the mortgageor on the debt. *Wells v. Lincoln County*, 424.

SEE PERSONAL PROPERTY.

SCHOOLS.

SCHOOLS: DIVISION OF DISTRICTS. When a new district is formed, including within its limits those who have heretofore aided in the erection of a school house in the district from which they are detached, the tax authorized by section 7024, Revised Statutes, to raise a fund for the erection of a school house for the new district is to be levied upon the whole of the original district, and not on only so much of it as is left after taking off the new district. *School District No. 11 v. Lauderbaugh*, 190.

SET-OFF.

SET-OFF: COMMISSIONS: ASSIGNMENT. In a suit upon a promissory note where the defendant pleads as a set-off commissions from plaintiffs due a co-partnership, of which he is a member, if the commissions were assigned to defendant, by the co-partnership, before the commencement of the suit, then, for the purposes of a set-off, they were due him, and accorded with the allegation of the answer. And if

defendant's co-partners allowed him the commissions individually, with consent of plaintiffs, it was in effect, an assignment with notice. *Hall v. Allen*, 286.

SHERIFF'S DEED.

See Deed.

SIGNIFICATION OF TERMS.

"Cattle," "neat cattle," "steers." See The State v. Lawn, 241.

SLANDER.

See Pleading, Civil, 6, 7, 8, 9, 10.

Evidence, 20.

Practice, Civil, 8, 9.

STATUTES CONSTRUED.

REVISED STATUTES OF 1879.

Section 189, see page 664.
Section 205, see page 664.
Section 206, see page 664.
Section 325, see page 504.
Section 669, see page 474.
Section 809, see page 147.
Section 1244, see page 681.
Section 1249, see page 681.
Section 1250, see page 681.
Section 1307, see page 241.
Section 1540, see page 175.
Section 1908, see page 516.
Section 2197, see page 474.
Section 2392, see page 257,
Section 2521, see page 112.
Section 2839, see page 634.
Section 3295, see page 341.
Section 3296, see pages 130, 341.
Section 3499, see page 289.
Section 1143, see page 80.
Section 4145, see page 80.
Section 4153, see page 80.
Section 5438, see page 601.
Section 5442, see page 601.
Section 5459, see page 173.
Section 5472, see page 303.
Section 5471, see page 303.
Section 7024, see page 190.

WAGNER'S STATUTES, 1872.

Page 430, § 2, see page 409.
Page 459, § 4, see page 108.
Page 698, § 5, see page 363.

REVISED STATUTES, 1855.

Page 748, § 56, see page 257.
Pages 1005, 1009, §§ 1, 21, see page 257.

ACTS OF 1877.

Page 342, § 1, see page 216.

ACTS OF 1883.

Pages 86, 87, §§ 1, 4, see page 601.

SUBROGATION.

See Principal and Surety, 1, 3.

Mortgages and Deeds of Trust, 1.

SUPERSEDEAS.

See Appeals, 3, 4.

SWAMP LANDS.

See Land and Land Titles, 4, 7.

TAXATION.

Excessive tax: replevin. Replevin will not lie against the collector of taxes to recover personal property seized to satisfy a tax levied by the proper officer; and it does not matter that the levy is excessive, and that fact is apparent on the face of the tax-book. *Mowrer v. Helferstine*, 23.

TAX DEED.

See Land and Land Titles.

Evidence.

TAXES.

1. Taxes: collector: seizure. A collector can seize personal property by virtue of the tax-book and annexed warrant, commanding the collection of the personal tax appearing in the tax-book, although the latter may not conform to the law in containing upon its face a descriptive list of the personal property upon which the tax was claimed. *Dickson v. Rouse*, 224.

2. Collector: warrant. The tax-book and warrant having been delivered to the defendant as collector upon his accession to office, he having been appointed in the place of another who failed to qualify, the fact that the warrant itself was addressed to the latter does not affect the validity of the seizure and levy made by the defendant. *Ib.*

3. Tax books. The books in the collector's office are not records within the rule in *Vance v. Corrigan*, 78 Mo. 94, so that if the name of the defendant in the tax suit appears on those books as owning the land, he is to be regarded as the record owner. *Watt v. Donnell*, 195.

4. Mistake: taxes: collector: payment on wrong land. Taxes on real property are assessed against the land, and not against the owner. When they become due, it is the duty of the owner to pay the tax assessed on the land as such, and where one pays the taxes on certain described land or lots designated by him as his, and requests and receives the receipt of the collector therefor, he cannot afterward recover the amount on the ground of mistake. It would be otherwise where the owner or his agent trusts to the collector to

look up the numbers, which the collector undertakes to do, and furnishes the wrong numbers, and payment is made upon the belief of their correctness. *Mathews v. The City of Kansas* 231.

5. ——: ——: ——. The collector acts for the public in the collection of the revenue. The mistake of the tax-payer, himself, should not imperil this fund, and where one lies by for four years after making such mistake before demanding a rectification, he should, at least, come with clearest equity. *Ib.*

6. TAXES: COLLECTION: SEIZURE. No means can be resorted to to coerce the payment of taxes, other than those provided by statute, and the only manner in which the collector can proceed against personal property for taxes due on it, is, after the required demand and notice, to seize it as directed by the revenue law, and there can be no lien on it before seizure. *The State ex rel. Davis v. Goodnow*, 271.

7. FIXTURES: TAXES: LIEN. The lien of the State for taxes on the realty cannot follow severed fixtures as personal property. *Ib.*

TEXAS CATTLE.

See JUDICIAL NOTICE.

VARIANCE.

1. ENTRY NUNC PRO TUNC: WHEN MADE. Unless there is something of record by which to amend, an entry *nunc pro tunc* cannot be made. But where the files of the court, the motion, the entry of its filing, its purpose and the entry of similar orders at the same term, in the same cause, show that the order was made, a *nunc pro tunc* entry may be made. *Hansbrough v. Fudge*, 307; *Briant v. Jackson*, 318.

2. PRACTICE: REPLY: FAILURE TO FILE. Where a cause has been tried on the theory that a reply has been filed putting in issue the new matter of the answer, the omission to file such reply cannot be taken advantage of on an appeal. *Heath v. Goslin*, 310.

3. INDICTMENT: VARIANCE. Where the indictment charges the assault was made on *Olive Hodson*, and the evidence shows that it was *Mrs. Hodson*, *Held*, no variance material to the merits of the case, since the court below did not so find, and that finding is the test on this point. *The State v. Smith*, 516.

VENDOR'S LIEN,

See VENDOR AND VENDEE.

VENDOR AND VENDEE.

1. VENDOR'S LIEN: WAIVER. The acceptance by the vendor of

other personal security than the note or obligation of the vendee, is only *prima facie* evidence of his intention to waive his vendor's lien, and may be rebutted by facts and circumstances which take from the act its *prima facie* import. *Hunt v. Marsh*, 396.

2. ——— : FACTS WHICH REBUT PRESUMPTION OF WAIVER. Where it appeared that the vendor sold the land in the first instance to M, that the deed, at the latter's request, was made to his wife and son, that M paid part of the purchase money, that he delivered the note with his name on it for the balance; paid part of this note and entered into the possession of the land and still holds the possession thereof, *Held*, these facts divest the note of its independent and collateral character, and rebut the presumption of an intention on the part of the vendor by its acceptance, to waive the lien. *Ib.*

3. COVENANT AGAINST INCUMBRANCES: WHEN RIGHT OF ACTION ACCRUES. No right of action accrues on a covenant against incumbrances in favor of the vendee of land, until he suffers an ouster or has been compelled to extinguish the incumbrances to save his estate. *Ib.*

VENUE.

4. VENUE. Where the bill of exceptions purports to preserve all the evidence, and fails to show that the offense was committed in the county charged in the information, the judgment will be reversed. *The State v. Apperger*, 173; *The State v. Britton*, 60.

2. JUSTICES' COURTS: CHANGE OF VENUE: JUDGMENT. A judgment entered by a justice of the peace after a change of venue has been applied for, in due form, is erroneous, but cannot be treated as a nullity in a collateral proceeding. *The State ex rel. Colvin v. Six*, 61.

WHERE LAID. See The State v. Dennis, 589.

VERDICT.

1. PETITION: ASSAULT AND BATTERY: GENERAL VERDICT. One good count in a petition containing two counts for the same cause of action, will support a general verdict. *McKee v. Calvert*, 348.

2. VERDICT: IMPEACHMENT OF. A verdict of a jury cannot be impeached, either by the affidavit of a juror, or by statements of the latter to third persons. *The State v. Dunn*, 681.

WILLS.

THE PROBATE OF A WILL is a judicial proceeding, and when made in another state a copy properly authenticated under the laws of the United States, is to be received in evidence in the courts of this State under section 1, article 4 of the Constitution of the United States. *Keith v. Keith*, 125.

WITNESSES.

6. WITNESS: EVIDENCE OF CONVICTION. When parol evidence is objected to, the record must be produced to prove the conviction of a witness. Another witness will not be allowed to testify that he saw the first in the penitentiary as a convict. This is true equally whether the testimony is offered to affect his competency or his credibility. *The State v. Lewis*, 11.

2. A CASE where the defendant is not incompetent as a witness, neither of the original parties to the contract in controversy being dead. *May v. Burk*, 675.